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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

~~No. 220.~~ 23

THE ORIENT MUTUAL INSURANCE COMPANY,
PLAINTIFF IN ERROR,

vs.

JOHN S. ADAMS, SUING UNDER THE DESIGNATION OF J. S. ADAMS, AND CHARLES F. ADAMS, SUING UNDER THE DESIGNATION OF C. F. ADAMS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

FILED DECEMBER 26, 1883.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

lawful agent of said defendant company, having his office at Pittsburgh, Pennsylvania, and said policy was issued to plaintiffs in Pittsburgh, Pennsylvania; that both of the plaintiffs then were and still are residents and citizens of the State of Pennsylvania; that the steamer "Alice" was a stern-wheel passenger and freight steamer, was 250 feet long, 38-foot beam, and five-foot depth
4 of hold and in good order and repair, and the perils issued against were those "of the seas, lakes, rivers, canals, fires, and jettisons;" that on the 28th day of April, A. D. 1880, the steamer "Alice" was destroyed and sunk by a peril of the river in the Ohio river near Cincinnati, and plaintiffs thereby suffered a total loss. Affiant would state that no part of the wreck has yet been recovered, but even if recovered its value would not exceed sixty-five hundred dollars ($6,500.00). At the time of loss said steamer was fairly worth twenty-seven thousand dollars ($27,000.00), and plaintiffs' loss thereby—at least twenty thousand dollars. Due notice and proof of loss were duly given by plaintiffs to defendant company, but defendant has and still does neglect and refuse to pay the said insurance.

That in accordance with the acts of the General Assembly of the Commonwealth of Pennsylvania the said defendant company for the period aforesaid, to wit, for the years including the months of December and January aforesaid, did stipulate in writing and file the same with the insurance commissioners of the State of Pennsylvania, whereby said defendant agreed that any legal process or summons affecting the company might be served on the insurance commissioner, and that said service would be as effectual as if
5 served personally on the said company within this State, and agreeing that the said stipulation could not be revoked by company defendant so long as any liability to any resident of the State of Pennsylvania should continue. Affiant further shows that said defendant company is not now transacting business in Pennsylvania and has no office in said State, and that the liability of said insurance company still continues to plaintiff, and that it is a case where the insurance commissioner aforesaid may accept service of the summons in this case to be issued; that plaintiffs have in all respects fully complied with and kept all parts of the contract on their part to be kept and performed, and that the defendant company is justly and truly indebted to said plaintiffs in said sum of five thousand dollars, with interest.

C. F. ADAMS.

Sworn to and subscribed this December 4, 1880, coram—
J. O. BROWN, *Pro.*

(Indorsed:) No. 693. Dec'r t'r., 1880. J. S. & C. F. Adams *vs.* The Orient Mutual Insurance Company. Affidavit of claim and statement of facts. Issued Dec. 4, 1880. D. T. W.

6 *Summons.*

THE COMMONWEALTH OF PENNSYLVANIA, } *ss:*
Allegheny County, }

We command you that you summon The Orient Mutual Insurance Company, a corporation, so that it be and appear before our court of common pleas No. 1 to be holden at the the city of Pittsburgh, in and for said county, on the first Monday of Dec. next, there to answer J. S. Adams and C. F. Adams of a plea of trespass on the case, and have you then and there this writ.

[SEAL.]

Witness the Hon. Edwin H. Stowe, president judge of our said court, the 4th day of Dec., A. D. one thousand eight hundred and eighty.

J. O. BROWN,
Prothonotary.

Indorsed: No. 69. Dec'r term, 1880. J. S. & C. F. Adams *vs.* The Orient Mutual Insurance Company. Summons case to first Monday of Dec'r, 1880. *Tarde venit;* so ans. Thos. H., sh'ff. Sh'ff, H., 40 cts. D. T. W., attorney for plaintiff.

7 *Narr.*

Court of Common Pleas No. 1 of Allegheny County, Pa. December Term, 1880.

J. S. & C. T. ADAMS
vs.
THE ORIENT MUTUAL INSURANCE COMPANY, a Corporation. } No. 693.

ALLEGHENY COUNTY, *ss:*

The Orient Mutual Insurance Company of the State of New York, defendant, was summoned to answer J. S. Adams and C. F. Adams, the plaintiffs, of a plea of trespass upon the case in assumpsit, whereupon the said plaintiffs, by D. T. Watson, their attorney, complain of said defendant for that whereas, heretofore, to wit, on the first day of January, A. D. 1879, to wit, at Pittsburgh, in the county aforesaid, the said defendant, by its certain policy of insurance, numbered 147, by it then and there made and signed by its president and attested by its secretary, which said policy plaintiffs now bring into court, in consideration of the sum of — dollars then and there paid by the said plaintiffs, did insure the said plaintiffs against loss or damage by perils of the seas, lakes, rivers, canals, fires, and jettisons to the amount of five thousand dollars on a certain steamboat or vessel known as the "Alice," and upon her tackle, apparel, furniture, &c., as specified in writing in said policy of insurance and made a part hereof.

8 And said defendant company thereby promised and agreed to make good unto said plaintiffs all such immediate loss or damage not exceeding in amount the sum or sums insured as shall

happen by perils of the seas, lakes, rivers, canals, fires, and jettisons from the thirty-first day of December, A. D. 1879, at noon, until the thirty-first day of December, A. D. 1880, at noon, the amount of loss or damage to be estimated according to the actual cash value of the property at the time of the loss, and to be paid sixty days after due notice and proof of the same, according to the terms of said policy.

And whereas an accident or peril occurred to said steamboat or vessel known as the "Alice" in a manner insured against in said policy of insurance since the time of taking out said policy and some time previous to the bringing of this suit, by which said accident or peril the plaintiffs sustained loss and damage on said described steamboat or vessel known as the "Alice," and on the tackle, apparel, and furniture belonging to said steamboat or vessel as aforesaid insured by said policy amounting to the sum of twenty thousand dollars.

And whereas the said plaintiffs complied with all the conditions and terms of said policy of insurance and gave due notice of said accident or peril, and made dueproof of said loss and damage, as required by the terms of said policy of insurance, and more
9 than sixty days have elapsed since said notice and before the bringing of this suit—

Yet nevertheless the said defendant company has not paid said insurance, or any part thereof, nor adjusted the same, as it was bound to do in accordance with its said promises, by reason [of] which an action has accrued to said plaintiffs to have and demand of and from said defendant said sum of five thousand dollars so insured as aforesaid.

And whereas the said defendant company was indebted to said plaintiffs in the sum, to wit, five thousand dollars, for money found to be due from the defendant to the plaintiffs in an account then and there stated between them; and whereas the defendant afterwards, to wit, on the day and year aforesaid, in consideration of the premises, then and there promised to pay the said several sums of money, on request, to the plaintiffs, yet it has disregarded its said promises, and has not paid any of the said moneys nor any part thereof, but hath hitherto wholly neglected and refused so to do, to the damage of the plaintiffs' ten thousand dollars, and therefore they bring suit.

D. T. WATSON,
Attorney for Plaintiffs.

Indorsed: No. 693. Dec'r term, 1880. Adams *et al vs.* The Orient Mutual Insurance Company. Narr. Filed Dec. 6, 1880. D. T. W.

10 *Precipe for Alias Summons.*

Dec. T., 7, 1880.

J. S. & C. F. ADAMS
vs.
THE ORIENT MUTUAL INSURANCE COMPANY. } No. —.

Please issue *alias* summons in above-stated case to next return day.

D. T. WATSON,
Att'y for Pl'ffs.

To J. O. Brown, prot.

Indorsed: No. 693. Dec'r term, 1880. J. S. & C. F. Adams *vs.* Orient Mutual Insurance Company. Precipe for *alias* summons. Iss'd Dec. 7, 1880. D. T. W.

11 *Affidavit of Defence.*

In the Court of Common Pleas No. 1. Dec'r Term, 1880,

J. S. & C. F. ADAMS
vs.
THE ORIENT MUTUAL INS. CO. } No. 693.

ALLEGHENY COUNTY, *ss:*

W. H. Markham appears, makes oath, and says that he is the general agent of the Orient Mutual Insurance Co., defendant, and that said defendant has a full, entire, and good defence to the whole of plaintiff's claim in this case; and in reply to the statement of alleged facts and affidavit filed by plaintiffs in this case he says and answers the same as follows, viz:

Statement first. As to the location of said company and its said agency in Pittsburgh, the same is admitted.

Second. The issuing of said policy of insurance is also admitted.

Third. This is correct as to the size of the vessel as named in the policy. It is not true that the contract of insurance was made and the policy issued at Pittsburgh, Pa. The facts are, the application for the insurance was made to our agent at Pittsburgh, Pa., and was forwarded by him to deponent, the general agent of the company at St. Louis, Mo. I, acting on behalf of the company, approved the application. The policy was issued in New York and countersigned by me as general agent at St. Louis, and by me forwarded to the Pittsburgh agent, who delivered it.

12 Fourth. This paragraph is true as to the size and ton-age of the vessel and risks insured against, but it is not true, as alleged, that the said steamer Alice was on the said 28th of April, 1880, or upon any other day, destroyed and sunk by a peril of the river in the Ohio river near Cincinnati, Ohio, and that plaintiff thereby suffered a total loss; and it is also not true that no part of said wreck has been recovered; that the same, if recovered, is only worth the sum of $6,500.

It is not true that plaintiff's loss by said alleged accident

amounted to $20,000.00; but the facts are that said vessel on said day did sustain an injury and partial loss by reason of said vessel running against the pier of the bridge over the Ohio river at the falls of said river near Louisville, Ky; but in fact said loss and accident were caused by the misconduct of one of said plaintiffs, the said C. F. Adams, who was at the time the master in sole charge of said vessel, as hereafter more fully stated, and the injury to said vessel did not exceed seven thousand dollars.

Part fifth is true.

Part sixth is untrue.

The facts are that the steamer Alice was, on said 28th of April, 1880, at about 8 o'clock a. m., lying at the Louisville wharf immediately above the falls of the Ohio river. Her engineers were
13 engaged in making necessary repairs to the boiler and had blown off all the steam from said boilers. And the said C. F. Adams, the master, then being in a state of intoxication from the use of spirituous liquors or other stimulants, did go upon the deck of said steamer and direct his officers and crew to cut said vessel loose from her mooring, which was done, and the said vessel, then having no steam in her boilers and no propelling power, as a necessary result floated down and was drawn by the current upon said falls and struck a pier of said bridge and was injured, and then floated down over the falls and landed on the Kentucky side near the cement mill against a bluff bank. After the water fell her guards were above water and when she was raised she was floated off and is now ready for repairs; that said vessel was insured in other companies for $13,000, and in case of partial loss each company is bound by the terms of said policies to pay only its portion; that even if the defendants are liable in this case they are liable for the $\frac{5}{13}$th of said partial loss, less one-third new for old. And affiant avers and says that said vessel was not abandoned by said insurance companies and can be successfully repaired, and that said defendants are not liable for said partial loss or any part thereof, because the
14 same was caused by the gross and wilful misconduct of said master and owners; that affiant is informed that said plaintiffs have already collected upon the other policies upon said vessel the sum of $10,400.00 on account of said partial loss, a *some* largely in excess of the actual loss sustained. All of which facts def'ts can prove on the trial.

Sworn and subscribed this 14th day of Dec., 1880, coram—

[SEAL OF NOTARY.] W. H. MARKHAM.

Endorsed: No. 693. Dec. term, 1880. J. S. & C. F. Adams *vs.* The Orient Mutual Insurance Co. Affidavit of defence. Filed Dec. 15, 1880. Barton & Sons.

15 *Plea.*

Com. Pleas No. 1. Dec. T., 1880.

J. S. & C. F. ADAMS
vs.
THE ORIENT *and* MUTUAL INSURANCE CO. } No. 693.

And now, January 8, 1881, comes defendant, by its attorney, and pleads non-assumpsit and payment, with leave to give in evidence the matters set forth in the affidavit of defence, which is adopted as a special plea.

BARTON & SONS.
Att'y- for Def't.

Indorsed: No. 963. Dec. term, 1880. J. S. & C. F. Adams *vs.* The Orient Mutual Ins. Co. Pleas. Filed Jan'y 10, 1881.

16 *Precipe for Issue Docket.*

Com. Pleas 1. Dec. Term, 1880.

J. S. & C. F. ADAMS
vs.
THE ORIENT MUTUAL INS. CO. } No. 693.

Please put above-stated case on the issue docket.
Jan'y 11, 1881.

D. T. WATSON,
Att'y for Pl'ffs.

To J. O. Brown, Esq., proth.

Indorsed: No. 693. December term, 1880. Adams *et al. vs.* The Orient Mutual Ins. Co. Precipe for issue docket. D. T. W.

17 *Petition, Affidavit, and Bond to Remove.*

Court of Common Pleas No. One. Dec. T'r., 1880.

J. S. ADAMS and C. F. ADAMS
vs.
THE ORIENT MUTUAL INSURANCE CO., a Corporation. } No. 693.

STATE OF PENNSYLVANIA, }
County of Allegheny, } *ss:*

To the honorable the judges of said court:

The petition of W. H. Markham, general agent of the Orient Mutual Insurance Company, on behalf of the Orient Mutual Insurance Company, a corporation under the laws of the State of New York, defendant in the above case, respectfully represents—

That the said defendant corporation is a non-resident of the State of Pennsylvania, its principal office being in the city and State of New York, and its stockholders are non-residents of the Commonwealth of Pennsylvania, being citizens and residents of the State of New York.

That the cause of action in this case is for the alleged loss sustained by the plaintiffs occasioned by the sinking of the steamer "Alice" at or near the falls at Louisville, Kentucky, which said steamer
18 was insured upon a policy of insurance dated the 29 day of Dec'r, 1879, issued from its office in the city of New York; that the amount claimed by said plaintiffs is greatly in excess of the sum of five hundred dollars, exclusive of costs, to wit, the sum of five thousand dollars.

That said action is still pending in your honorable court to be tried by jury, and your petitioner avers that it has reason to believe and does believe that from prejudice and local influence it will not be able to obtain justice in said State court in which said case is pending.

Your petitioner therefore prays that said action may be certified into and removed to the circuit court of the United States for the western district of Pennsylvania, there to be tried and proceeded in according to law, as directed by the act of Congress of the United States in such case made and provided.

W. H. MARKHAM,
General Agent Orient Mutual Ins. Co.

STATE OF MISSOURI, } *ss:*
City of St. Louis, }

Before me, a notary public in and for said county, duly commissioned, sworn, & acting, came W. H. Markham, agent in this behalf of defendant corporation, who, being duly sworn, doth depose and say that the matters set forth in the foregoing petition are true.

W. H. MARKHAM.

Sworn to and subscribed before me the 31 day of January, A. D. 1881.
19 My term ends Feb'y 18, 1883.
[SEAL.] C. D. GREEN, JR.,
Notary Public.

Know all men by these presents that we, The Orient Mutual Insurance Company of the City of New York and State of New York, as principal, and William M. McElroy and Edward Kelley, Jr., of the city of Pittsburgh, county of Allegheny and State of Pennsylvania, as sureties, are held and firmly bound unto said J. S. Adams and C. F. Adams, said plaintiffs, in the sum of five hundred dollars; for the payment of which we do bind ourselves, our heirs, executors, jointly, severally, and firmly by these presents.

Witness our hands and seals the 3d day of February, A. D. 1881.

Conditioned that whereas the said Orient Mutual Insurance Company of New York is defendant in a certain action brought by J. S. Adams and C. F. Adams against said Orient Mutual Insurance Company, pending in the court of common pleas No. 1 of Allegheny county, Pennsylvania, at No. 693, of December term, 1880, and it, the said defendant, has made application to remove said cause for trial to the circuit court of the United States for the western district of Pennsylvania:

Now, therefore, if the said Orient Mutual Insurance Company of New York, defendant, if said order of removal is made, shall and do cause to be executed and filed at the next term of said
20 circuit court of the United States for the western district of Pennsylvania a certified copy of the record and all proceedings and pleadings in said cause, and appear to the same, and in all things comply with the provisions of the acts of Congress in such case made and provided as to the removal of said cause without fraud or delay, then this obligation to be void; otherwise to be and remain in full force and virtue.

Attest: WM. M. McELROY. [SEAL.]
EDWARD KELLEY, JR. [SEAL.]

[Seal of the Orient Mutual Ins. Co.]

THE ORIENT MUTUAL INS. CO.,
By ALFRED OGDEN. *V. P.*
Attest: CHARLES IRVING, *Sec'y.*

STATE OF NEW YORK, *City & County of New York:*

Be it remembered that on this 3rd day of February, A. D. 1881, before me, Edwin F. Corey, a commissioner for the State of Pennsylvania, duly commissioned and qualified, and residing in the city of New York, personally came Charles Irving, who, being duly sworn according to law, doth depose and say that he was personally present and did see the common or corporate seal of the above-
21 named The Orient Mutual Insurance Company affixed to the foregoing instrument; that the seal so affixed is the common or corporate seal of said The Orient Mutual Insurance Company, and who so affixed it by authority of the said corporation, and the act and deed thereof; that the above-named Alfred Ogden is the vice-president of the said corporation, and did sign the said instrument as such in the presence of this deponent; that this deponent is the secretary of the said corporation, and that the name of this deponent above signed in attestation of the due execution of the said instrument is of this *own* deponent's own proper handwriting.

CHARLES IRVING.

[Seal of Com'r for Penna.]

EDWIN F. COREY,
Commissioner and Commissioner for the State of Pennsylvania, 54 Wall Street, New York.

And now, March 19, 1881, the within application [is] presented and considered, and the same is ordered to be filed and the bond approved, and the case is now ordered to be certified and sent into and filed in the circuit court of the United States for the western district of Pennsylvania, as directed by the act of Congress in such case made and provided.

By the court.

Filed March 19, 1881.

22 *First Bill of Exceptions.*

In the Circuit Court of the United States for the Western District of Pennsylvania. May Term, 1883.

J. S. & C. F. ADAMS
vs. } 31.
THE ORIENT MUTUAL INSURANCE COMPANY.

On the trial of this cause, to maintain on their behalf the issues joined, the plaintiffs produced in evidence the policy of insurance described in the complaint (the execution of which was admitted), which is in the following words and figures:

Orient Mutual Insurance Company (of New York).

No. 147. Vessel, st'r Alice.

Valuation, $27,000; sum insured, 5,000; premium, $550. On account of present owners. Loss, if any, payable to assured.

This policy of insurance witnesseth: That the Orient Mutual Insurance Company (of New York), by these presents, do cause J. S. & C. F. Adams to be insured in the sum of not exceeding five thousand dollars, lost or not lost, upon the steamer Alice, wherever she is in safety at noon of the thirty-first day of December, 1879, and from thence to noon of the thirty-first day of December, 1880, when this policy shall expire, unless sooner terminated or made
23 void by conditions hereinafter expressed, with permission to navigate the Ohio, Mississippi, Cumberland, Tennessee, and Illinois rivers.

(Underwriter's obligation.)

This company having been paid the consideration for this insurance at the rate of eleven per cent. for the term of this policy, the said steamer Alice hereby insured being valued at twenty-seven thousand dollars, touching the perils which the said insurance company is content to bear and take upon it under this policy, *they* are of the seas, lakes, rivers, canals, fires, and jettisons, that shall come to the damage of said vessel or any part thereof; and in case of loss such loss to be paid in sixty days after proof thereof, proof of interest and adjustment exhibited to the assurers, all sums owing by the assured to the company being first deducted or secured to the satisfaction of the assurers before such loss shall be paid, but no loss by special average shall in any case be paid unless the necessary repairs required solely by the disaster (exclusive of the cost of taking the vessel on the docks or hauling her out on marine ways, the cost of dock or railway fees while being repaired, and the cost of ascertaining and proving the loss) shall amount to 5 per cent. on the value of said vessel, as specified in the policy.

(Obligations of the assured.)

24 This policy shall become void if any further insurance has been or shall be made on said vessel which, together with

this insurance, shall exceed the sum of eighteen thousand dollars, or upon any assignment of this policy or charter of said vessel, unless notice is given to this company and the same be approved and endorsed thereon in writing by the company; also during any time said vessel shall carry hemp on deck, unless the same be covered by bagging, or unslacked lime in the hold or cotton on the hurricane deck, and also in case the note or other obligation given for the premium herefor be not paid within three days after maturity and demand, and remain void during the time the same shall be overdue and unpaid. It is also agreed that insurance by this policy shall cease during the time said vessel shall be taken and held in possession or custody under any proceedings in law or equity, except during the first five days after seizure. No assignment or transfer hereof shall in any case relieve the insured or property hereby insured from any or all of the conditions expressed in this policy, and a violation or non-compliance with any of such conditions, either by the assignee or assignor, before or after the assignment, shall vitiate this policy.

25 Warranted by the assured that this company shall be free from all claim for loss or damage arising from or caused by theft, barratry, rob-ery, civil commotion, war, or piracy, or during any time said vessel shall be seized and taken possession of or detained by any act of the United States Government or other legally-excluded causes; from damage that may be done by the vessel hereby insured to any other vessel or property; from any loss or damage occasioned by said vessel being improperly laden, by the bursting of boilers, the collapsing of flues, explosion of gunpowder, the derangement or breaking the engine or machinery, or any consequence resulting therefrom, unless the same be caused by unavoidable external violence; from any loss or damage occasioned by ice between Bissel's Point and the bridge in the port of St. Louis, Mo.; from loss or damage occasioned by the use on board of coal-oil or spirit gas in any form; from any consequence of said vessel having been engaged in an illicit or prohibited trade at any time whatever, and from any loss caused by the use of an open light of any kind in the hold; that there shall be no abandonment as for a total loss on account of said vessel grounding or being otherwise detained, or in consequence of any loss or damage, unless the injury sustained be equivalent to fifty per centum of the

26 agreed value in this policy; that the aforesaid vessel is, and shall be at all times during the continuance of this policy, tight and sound, sufficiently found in tackle and appurtenances thereto, competently provided with master, officers, and crew, and in all other things and means for the safe employment thereof, and that said vessel shall be run and navigated upon the aforesaid privileged waters as is usual for boats of her class in the usual prosecution of business, and that this policy shall be null and void while said vessel shall be unseaworthy or condemned as unseaworthy, except while proceeding to a port for repairs and during the time of such repairs; that in the night time said vessel shall show, in a conspicuous place, one or more lights, so as to warn and give notice to

boats and approaching vessels, and that while in port or laid up at least two competent watchmen shall be employed, one of whom shall be on duty at all times; that in all cases of loss or damage the assured shall furnish to said company proofs of the same within thirty days from the date thereof, and all claims under this policy shall be barred unless presented within one year from the same date,
27 and no loss shall be paid unless the assured shall give immediate notice in case of accident or loss to the company, and that the liability of this company for all losses during the continuance of this policy shall not, in the aggregate, exceed the sum hereby assured.

In case of any loss or misfortune resulting from any peril insured against the party insured shall use every effort for the safeguard and recovery of said vessel, and, if recovered, to cause the same to be forthwith repaired; and in case of neglect or refusal on the part of the assured, their agents or assigns, to adopt prompt and efficient measures for the safeguard and recovery of said vessel then the said insurers are hereby authorized to interpose and recover said vessel and cause the same to be repaired for account of the insured, to the charges of which the said insurance company will contribute in proportion to the sum herein insured bears to the agreed value in this policy, but in no case whatever shall the assured have the right to abandon until it shall be ascertained that the recovery and repairs of said vessel are impracticable, nor sell the wreck, or any portion thereof, without the consent of this company, and the acts of the assured or assurers, or of their joint or respective agents, in
28 preserving, securing, or saving the property insured in case of danger or disaster shall not be considered or held to be a waiver or acceptance of an abandonment. In case of accident rendering repairs necessary the master or owner shall cause the said vessel to be surveyed by a competent inspector, who shall, under oath, note particularly the damage sustained and the repairs required thereby. All claims for repairs shall be accompanied by the vouchers and by the oath or affirmation of the master that such expenses were actually incurred and made necessarry by the accident which may have happened to said vessel.

(Adjustment of loss.)

No deduction will be made from claims for repairs to the hull or machinery of said vessel during the first two years from the date of her original custom-house survey, but from all claims for repairs to the cabin or tackle or apparel or funiture, or for replacing the same, the assured shall deduct one-third, that being the agreed difference in value between new and old materials, and the same deduction shall be made from claims for repairs to the hull and machinery after the first two years as aforesaid.

No allowance will be made for wages or provisions paid or
29 furnished to officers or crew while the vessel is detained by any accident or while undergoing any repairs, except for the time they are actually employed for the safety of the vessel and cargo, for which they will be included in the general average ac-

count. Whenever this company shall pay any loss the assured agrees to assign over to said company all right to recover satisfaction therefor from any other person or persons, town or other corporation, or the United States Government, or to prosecute therefor at the charge and for account of the company, if requested. And the said company shall be entitled to such proportion of said damages recovered as the amount insured by them bears to the valuation of said vessel.

In case of return of premium at the request of the assured, a deduction shall only be made on the whole months of unexpired time, the earned time to be charged for at short rates.

In witness whereof the Orient Mutual Insurance Company have caused these presents to be signed by their president or vice-president and attested by their secretary at their office, in the city of New York, State of New York.

But this policy shall not be valid until countersigned by
30 W. H. Markham, duly authorized agent of said Orient Mutual Insurance Company, at St. Louis, Mo.

EUGENE DUTILT, *President.*

CHARLES IRVING, *Secretary.*

Countersigned at St. Louis, Dec. 29, 1881.

W. H. MARKHAM, *Agent.*

Indorsed: Vessel, str. Alice, No. 147. Orient Mutual Insurance Co., New York, to J. S. & C. F. Adams. Valuation, $27,000. Limit, $18,000. $5,000 at 11%, $550. Expires Dec. 31st, 1880.

And also produced evidence tending to show that they had paid the premium on the said policy; that on the 28th April, 1880, the steamer Alice mentioned in the policy was carried over certain falls of the Ohio river and sunk; that the damage done thereby to her amounted to a sum equal to fifty per centum of agreed value in the policy; that on the 18th May, 1880, her owner abandoned her as a total loss to the insurers and demanded the sum due under the said policy; and that the defendants had due notice of the premises; and that on the 18th May, 1880, it was apparently impracticable to float off and to repair the Alice; and that the plaintiffs at the time of the said loss were owners of the Alice, and that the loss of the Alice was not due to design wilfulness or design on the part of the captain.

Here the plaintiffs rested.

The defendant thereupon, to maintain the issue on its part, produced evidence tending to show that on the 28th April, 1880, the master of the Alice was C. F. Adams, one of the plaintiffs; that C. F. Adams is the son of the other plaintiff; that C. F. Adams has the reputation of being a drinking man; that such reputation was known to J. S Adams before the sailing of the Alice on her said trip; that on the morning of the accident and before it C. F. Adams had drunk liquor; that the Alice arrived at Louisville early on the morning of the 28th April, 1880; that on her arrival the master

gave the usual signal that he had no present need of the engines, and such signal was transmitted to the engineer; that the joint of the mud-valve was out of order, threatening damage to the freight and making repairs necessary; that steam was thereupon blown off in order to make repairs; that the captain came on board and saw the repairs going on; that such repairs made it necessary to blow off steam; that the captain knew that the mud-valve connected with the
32 boiler needed repairs; that thereafter he went on deck, and without making inquiry of the engineer of the condition of the steam, or receiving any signal or notice from the engineer that steam was ready, he tapped his bell, at about 8.30 a. m., as a signal to let go the boat; that at the time there was not sufficient steam in the boiler to propel the Alice; that it is the custom of the river that a master, before giving the order to let go, makes inquiry of the engineer as to the condition of the steam and awaits his reply that the steam is ready before he gives the order to let go; that at the time of the accident the Alice was in a position to be carried over the falls if she was let go without steam on; that upon being let go she was carried down the river by the current, and over the falls, and was struck against a pier and badly damaged; that in consequence of this damage she sunk soon soon thereafter below the bridge in about eighteen feet of water.

To further maintain the issue on its behalf, the defendant gave evidence tending to show that the Alice was but slightly injured, and [in] the spring of 1881 was floated and removed from the place at which she sunk and put in the condition in which she was
33 before, sinking for a sum a little less than $6,000; that the plaintiffs, after the Alice was raised, failed to pay the expense of raising her; that after the 18th May, 1880, the- sold the furniture and apparel of the Alice without the defendant's consent; that on or about the 28th April, 1880, they put the Alice into possession of the Cincinnati Underwriters' Wrecking Company, and that such company had the right of possession of the Alice from that time until she was seized by the United States marshal under process in December, 1880, upon maritime liens.

To further maintain the issues on its behalf the defendant produced in evidence an exemplification of the record of a certain cause entitled Cincinnati Underwriters' Company *vs.* the steamer Alice, &c., in the United States district court for the district of Kentucky, as tending to show that after the 18th May, 1880, the claimants, by the answers and petitions in the said suit, claimed to be owners of the steamer Alice and her furniture and apparel; that the Alice was subject to maritime liens in a considerable sum; that such liens existed on the 18th of May, 1880; that she was sold under the decree of the court to satisfy the same, and that the plaintiff received
34 a part of the proceeds of such sale; that the plaintiffs admitted that the Alice was slightly damaged, and they had refused after she was raised to pay the expense of raising her.

Here the defendant rested.

Thereupon the plaintiffs offered evidence tending to show that it was the custom of the river that the engineer should give notice to

the captain before exhausting steam, and that it was not the custom for the captain to have notice from the engineer that steam was ready before giving the order to let go.

The plaintiffs, in further reply, offered to prove by the plaintiff, C. F. Adams, that the steamer Alice, at the time of her loss, was insured in seven companies for a total insurance of eighteen thousand dollars, and, after the notice of abandonment, six of the companies, representing an insurance of $13,000.00, settled with the insured, and, as part of the settlement, released to the insured all their interest in the steamer Alice as she lay; that after the marshal's sale of the Alice the plaintiffs did claim to own the $\frac{1}{18}$ of all the proceeds of sale, and that when the claim for the entire proceeds was made it was as to form, under the advice of counsel; but the plain-
35 tiffs did not intend thereby to waive the abandonment theretofore made or to keep as against the Orient Insurance Company the $\frac{5}{18}$ of the proceeds of sale. This is offered as bearing upon the question of waiver of abandonment of the Alice.

To which offer the defendant objected; but the objection was overruled and the testimony of the witness admitted, and the defendant then and there excepted to the overruling of the objection and the admission of the testimony, and prays the court to sign and seal this its first bill of exceptions, which is done this 23rd day of November, A. D. 1882.

W. McKENNAN, [SEAL.]
Cir. Judge.

Here the plaintiffs rested their reply.

There was no further evidence produced.

Second Bill of Exceptions.

The evidence set forth in the first bill of exceptions being all in, the plaintiffs prayed the court to instruct the jury as follows:

If the jury should believe, under all the evidence, that on May the 18th, 1880, it was impracticable to recover and repair the Alice, and that the damage done to the Alice from the perils of the river amounted to a sum equal to fifty per centum of the agreed
36 value in the policies of insurance ($27,000.00), then the plaintiffs, under the terms of the policy, were entitled to abandon said vessel.

Which prayer was granted and the jury was so instructed.

To which instruction the defendant then and there excepted and prays the court to sign and seal this its second bill of exceptions, which is done this 23 day of November, A. D. 1882.

W. McKENNAN, [SEAL.]
Cir. Judge.

Third Bill of Exceptions.

The evidence set forth in the first bill of exceptions being all in, the plaintiffs prayed the court to instruct the jury as follows:

The right to abandon was to be determined on the facts as they existed on May the 18th, 1880, and if the right then existed and the

plaintiffs availed themselves of the same the subsequent floating off of the Alice in the winter or spring of 1881 would not change the rights of the parties.

Which prayer was granted and the jury was so instructed.

37 To which instruction the defendant then [and] are excepted and prays the court to sign and seal this its third bill of exceptions, which is done this 23d day of November, A. D. 1882.

W. McKENNAN, [SEAL.]
Cir. Judge.

Fourth Bill of Exceptions.

The evidence set forth in the first bill of exceptions being all in, the plaintiffs prayed the court to instruct the jury as follows:

Whether the injury to the Alice from the perils of the river equaled fifty per centum of her agreed value was a question to be determined on May the 18th, 1880, taking into consideration the place where the Alice lay and the uncertainty as to when (if at all) a rise would come to float her off and all other circumstances in the case.

Which prayer was granted and the jury was so instructed.

To which instruction the defendant then and there excepted and prays the court to sign and seal this its fourth bill of exceptions, which is done this 23rd day of November, A. D. 1882.

W. McKENNAN, [SEAL.]
Cir. Judge.

38 *Fifth Bill of Exceptions.*

The evidence set forth in the first bill of exceptions being all in' the plaintiff prayed the court to instruct the jury as follows:

Where a loss under a policy of insurance, such as the one in suit, happens from the perils of the river, it is not a defence to the insurance company that the remote cause of the loss was the negligence of the insured or his agents.

Which prayer was granted, and the jury was so instructed.

To which instruction the defendant then and there excepted, and prays the court to sign and seal this its fifth bill of exceptions, which is done this 23rd day of November, A. D. 1882.

W. McKENNAN, [SEAL.]
Cir. Judge.

Sixth Bill of Exceptions.

The evidence set forth in the first bill of exceptions being all in, the plaintiffs prayed the court to instruct the jury as follows:

39 The mere fault or negligence of the captain of the vessel, by which the Alice was drifted into current and drawn over the falls, will not constitute a defence for the company, unless the jury should be satisfied that the captain acted fraudulently or wilfully, with design in so doing.

Which prayer was granted, and the jury was so instructed.

To which instruction the defendant then and there excepted, and

prays the court to sign and seal this its sixth bill of exceptions, which is done this 23rd day of November, A. D. 1882.

W. McKENNAN, [SEAL.]
Cir. Judge.

Seventh Bill of Exceptions.

The evidence set forth in the first bill of exceptions being all in, the plaintiffs prayed the court to instruct the jury as follows:

If the jury should find, under all the evidence in the case, that under the established custom of the river the engineer should not have exhausted the steam on the Alice on the morning of April 28th, 1880, without notifying the pilot or captain, and that at a landing such as the Alice made at the barge Annie Kelley it was not the custom of the captain to receive notice from the engi-
40 neer before letting the boat go that he (the engineer) was ready and had steam, then the captain of the Alice, on the morning of April 28, 1880, if he was without knowledge that the steam had been exhausted, was not guilty of any such fraudulent or designed action as would constitute a defence to this action.

Which prayer was denied, but the court instructed the jury as follows:

If the jury find the facts as herein stated, the captain of the Alice was not guilty of such fraudulent or designed action as would constitute a defence to this action.

To which said answers of the court to the said plaintiff's first, second, third, fourth, fifth, and sixth points the counsel for the defendant did then and there except, and at his instance this bill of exceptions for the defendant is now sealed.

To which instruction the defendant then and there excepted, and prays the court to sign and seal this its seventh bill of exceptions, which is done this 23rd day of November, A. D. 1882.

W. McKENNAN, [SEAL.]
Cir. Judge.

Eighth Bill of Exceptions.

The evidence as forth in the first bill of exceptions being
41 all in, the defendant prayed the court to instruct the jury as follows:

If the jury are satisfied from the evidence that the accident and loss was caused by the misconduct of Captain Charles F. Adams, that then the plaintiff cannot recover.

To which prayer the court refused, but instructed the jury as follows:

This is true, if the jury is satisfied, that the conduct of the captain is properly characterized. If he designedly or recklessly exposed the boat to the dangers of navigation at the falls, knowing that she was not in a condition to encounter them, he was guilty of misconduct such as would relieve the defendant from liability; but if the proximate cause of the loss was the stranding of the vessel this was covered by the policy, and the defendant is not relieved from liability by showing that the loss was remotely ascribable to the negligence of the captain or the other officers or employees. The great

principle now established is that if the master, vessels, officers, crew, and equipments are competent and sufficient at the commencement of the voyage the assured has done all that he can practically do.

He did not guarantee the faithfulness and vigilance of the
42 master and crew, and he is not responsible for their negligence; but for the conduct of the master and mariners in the practical management and navigation of the vessel after the commencement of the voyage the insurer is not responsible, provided the actual loss occurs from one of the perils insured against, though such peril may have occurred in consequence of the negligence or carelessness of the master and crew.

To which refusal and to which instructions the defendant then and there excepted, and prays the court to sign and seal this its eighth bill of exceptions, which is done this 23rd day of November, A. D. 1882.

W. McKENNAN, [SEAL.]
Cir. Judge.

Ninth Bill of Exceptions.

The evidence as set forth in the first bill of exceptions being all in, the defendant prays the court to instruct the jury as follows:

If the jury are satisfied from the evidence that the accident happened in the manner detailed by Captain Charles F. Adams in his written report of the accident made on May the first, 1880, to the local inspectors of steamboats for the port of Louisville, Kentucky, to wit:

"That after discharging her Louisville freight at the wharf-
43 boat we then dropped down to the barge of the steamer Annie Kelley, where she received 20 barrels oil and four cook-stoves and fixtures, expecting to go immediately over the falls when all our freight was on board. When about ready to start the mate informed me that a joint had blown out of the mud valve. I walked to where the engineers were repairing it, and waited until they had finished repairing it. I then went forward and rang bell for them to get ready. I then walked upon the roof and rang my bell to let her go, supposing all was ready. I then ordered the pilot to come ahead on her, when the engineer sounded through the trumpet he had no steam; the lines had all been let go, and the boat was then at the mercy of the current; but we managed to get a line ashore, but too late to do any good, as the current was so strong that it parted our line, and we drifted over the dam and down the river against the bridge, when we struck the pier, knocking a hole in her side forward of the larboard cylinder, also knocking her chimneys down; then we drifted on down to near the cement mill, where we struck the bank and sunk in about fifteen feet of

water. Previous to striking the bridge the anchor was thrown
44 over but failed to do any good. All due exertions were made to save the steamer." That then the conduct and acts of the captain shows either misconduct or incompetency, and their verdict should be for the defendant, which prayer the court refused; to which refusal the defendant then and there excepted, and prays the

court to sign and seal this its ninth bill of exceptions, which is done this 23rd day of November, A. D. 1882.

W. McKENNAN, [SEAL.]
Cir. Judge.

Tenth Bill of Exceptions.

The evidence as set forth in the first bill of exceptions being all in the defendant prayed the court to instruct the jury as follows:

That the following statement made by Captain Charles F. Adams to the United States local inspector of steamboats for the port of Louisville, Kentucky, in his testimony before them on the 4th day of May, 1880, shows gross misconduct on the part of the captain in the navigation and control of the vessel, to wit: "About 5
45 o'clock a. m. we landed at the wharf-boat, at the foot of Fourth street, to put off some Louisville freight. We laid at the wharf-boat until about 8.30, when we dropped down to the barge of the steamer Annie Kelley, lying about the foot of Fifth street, for the purpose of taking on some freight. We laid there only ten or fifteen minutes. I went ashore, and, returning shortly afterwards, the mate told me the engineers had some repairs to make. I went back and found a joint had blown out of the mud-valve. I then waited until they were done. I then went forward and rang my bell for them to get ready, supposing they had steam enough to stem the current to get from the landing. I then went up on deck and rang the bell to let go, which was done."

Which prayer the court refused; to which refusal the defendant then and there excepted, and prays the court to sign and seal this its tenth bill of exceptions, which is done this 23rd day of November, A. D. 1882.

W. McKENNAN, [SEAL.]
Cir. Judge.

Eleventh Bill of Exceptions.

The evidence as set forth in the first bill of exceptions be-
46 ing all in, the defendant prayed the court to instruct the jury as follows:

That if the jury find from the evidence that the mud-valve or the joints connected therewith of the steamer leaked, so that it became necessary to repair the same, and that by reason thereof the engines of the boat had not sufficient steam to manage, navigate, and control the vessel, and while in that condition the boat was drawn down by the force of the current and carried over the falls of the Ohio river and injured and sunk, that then the loss was one falling within the condition and term of the policy in evidence, which provides that the insurance company shall not be liable if the loss is caused by the bursting of boilers, the collapsing of flues, the explosion of gunpowder, the derangement or breaking of the engine or machinery, or any consequence resulting therefrom, unless the same be caused by unavoidable external violence.

Which prayer the court refused; to which refusal the defendant then and there excepted, and prays the court to sign and seal this

its eleventh bill of exceptions, which is done this 23rd day of November, A. D. 1882.

W. McKENNAN, [SEAL.]
Cir. Judge.

47 *Twelfth Bill of Exceptions.*

The evidence as set forth in the first bill of exceptions being all in, the defendant prayed the court to instruct the jury as follows:

That if the jury find from the evidence that the steamer "Alice" was carried down over the falls, and so injured because she had not sufficient steam or propelling power to govern and control her, and this want of steam was caused by the mud-valve or joints connected therewith being out of order and in bad condition, that then the plaintiffs cannot recover.

Which prayer the court refused, but instructed the jury as follows:

If the jury find that the leakage of the mud-valve (or the joints connected therewith) and the exhaustion of the steam resulted from a derangement of the machinery which had not been repaired when the vessel was released from her mooring at the Annie Kelley barge, and that a derangement of the machinery was a direct and proximate cause of the loss, this point is affirmed. If they do not so find it is refused.

48 To which refusal and to which instructions the defendant then and there excepted, and prays the court to sign and seal this *his* twelfth bill of exceptions, which is done this 23rd day of November, A. D. 1882.

W. McKENNAN, [SEAL.]
Cir. Judge.

Thirteenth Bill of Exceptions.

The evidence as set forth in the first bill of exceptions being all in, the defendant prayed the court to instruct the jury as follows:

That if the jury are satisfied from the evidence that the "Alice" was recovered and repaired, that the fact that the same was done is the best evidence that it was practicable to recover and repair the boat.

Which prayer the court refused; to which refusal the defendant then and there excepted, and prays the court to sign and seal this its thirteenth bill of exceptions, which is done this 23rd day of November, A. D. 1882.

W. McKENNAN, [SEAL.]
Cir. Judge.

Fourteenth Bill of Exceptions.

49 The evidence as set forth in the first bill of exceptions being all in, the defendant prayed the court to instruct the jury as follows:

That to enable the assured to abandon the vessel to the underwriters it was necessary that they should have such custody and control of the same as to enable them to deliver the wreck as it then lay to the underwriters, and if the jury are satisfied that the assured did, on or about the 30th day of April, 1880, enter into a contract

with the Cincinnati Underwriters' Wrecking Company to raise said vessel, and that said wrecking company took charge of said wreck under said contract and was in possession of the same in May, 1880, at the time that the assured claims to have abandoned the same to the underwriters, that then there could be no abandonment within the meaning of that term, and the evidence of the plaintiffs is insufficient to establish the fact of abandonment.

Which prayer the court refused, but instructed the jury as follows:

The policy requires the assured "in case of any loss or misfortune" to "adopt prompt and efficient measures for the safety and recovery of the vessel." If the jury believe that the contract with the wrecking company was an appropriate and customary
50 means of saving and recovering the vessel, then the transfer of the possession of the vessel to the wrecking company for the purpose of enabling it to fulfil the contract and the necessary legal consequences of such contract did not disable the plaintiffs from making an effectual abandonment of the vessel.

To which refusal and to which instructions the defendant then and there excepted, and prays the court to sign and seal this its fourteenth bill of exceptions, which is done this 23rd day of November, A. D. 1882.

W. McKENNAN, [SEAL.]
Cir. Judge.

Fifteenth Bill of Exceptions.

The evidence as set forth in the first bill of exceptions being all in the defendant prayed the court to instruct the jury as follows:

That the record of the case of the Cincinnati Underwriters' Wrecking Company against the steamer Alice, &c., in the United States district court for the district of Kentucky in evidence is conclusive upon the question of abandonment raised in this case, and shows that the assured were not in a condition to and could
51 not have abandoned the vessel to the underwriters at the time alleged.

Which prayer the court refused; to which refusal the defendant then and there excepted, and prays the court to sign and seal this *his* fifteenth bill of exceptions, which is done this 23rd day of November, A. D. 1882.

W. McKENNAN, [SEAL.]
Cir. Judge.

Sixteenth Bill of Exceptions.

The evidence as set forth in the tenth bill of exceptions being all in, the defendant prayed the court to instruct the jury as follows:

That if the assured failed to receive the boat from the wrecking company after she was removed and cause- the vessel to be repaired, that then under the terms and conditions of the policy they cannot recover in this action.

Which prayer the court refused; to which refusal the defendant then and there excepted, and prays the court to sign and seal this

its sixteenth bill of exceptions, which is done this 23rd day of November, A. D. 1882.

W. McKENNAN, [SEAL.]
Cir. Judge.

52 *Seventeenth Bill of Exceptions.*

The evidence as set forth in the first bill of exceptions being all in, the defendant prayed the court to instruct the jury as follows:

That under all the evidence in the case the plaintiffs are not entitled to recover for as a total loss.

Which prayer the court refused; to which refusal the defendant then and there excepted, and prays the court to sign and seal this its seventeenth bill of exceptions, which is done this 23rd day of November, A. D. 1882.

W. McKENNAN, [SEAL.]
Cir. Judge.

Eighteenth Bill of Exceptions.

The evidence as set forth in the first bill of exceptions being all in, the defendant prayed the court to instruct the jury as follows:

If the court should decline to charge as requested in seventeenth point, and if the case is submitted to a jury to find as to a partial loss, then the jury must ascertain and find from the evidence the actual cost and expense of the raising of the boat and put-
53 ting her in repair; from this sum, when ascertained, they must deduct one-third new for old, as provided for by the terms of the policy, and then allow the plaintiffs five twenty-sevenths of the balance, after deducting the amount of the premium notes in evidence, with interest from the 30th day of June, 1880.

Which prayer the court refused, but instructed the jury as follows:

This is declined because the court has instructed the jury that there can be no recovery for a partial loss.

To which said answers of the court to said second, third, fourth, sixth, seventh, ninth, tenth, eleventh, twelfth, fifteenth, and eighteenth, the counsel for the said defendant did then and there except; at his instance a bill of exceptions is now sealed for the defendants.

To which refusal and to which instruction the defendant then and there excepted, and prays the court to sign and seal this its eighteenth bill of exceptions, which is done this 23rd day of November, A. D. 1882.

W. McKENNAN, [SEAL.]
Cir. Judge.

Indorsed: No. 31. May term, 1881. J. S. & C. F. Adams *vs.* Orient Mutual Insurance Co. Bill of exceptions as amended. Sealed Nov'r 23, 1882.

54 *Verdict.*

In the Circuit Court of the United States for the Western District of Pennsylvania. May Term, 1881.

J. S. & C. F. ADAMS
vs.
THE ORIENT MUTUAL INSURANCE COMPANY. } No. 31.

November 16, 1882.—The above case called for trial and jury sworn, viz: Adolph Gotthold, Abner Tracy, Robert W. Miller, Joseph Causer, E. L. Painter, Howard Bliss, J. C. Wilson, Thomas Ferguson, Noble N. Alvord, T. E. Hewett, Thomas Chalfant, and Samuel P. Smith, and thereupon plaintiff opens case and proceeds to offer evidence. Nov. 17, plaintiff closes and defendant opens and proceeds to offer evidence; and on November 22nd, the court having charged the jury, they find in favor of plaintiff the sum of $5,095.00.

H. D. GAMBLE, *Clerk.*

55 *Judgment.*

In the Circuit Court of the United States for the Western District of Pennsylvania. May Term, 1881.

JNO. S. & CHAS. F. ADAMS
vs.
THE ORIENT MUTUAL INSURANCE CO. } 31.

And now, May 29, 1883, the motion for a new trial having been overruled, the court, on motion of the pl'ff's attorney, enter judgment against the defendant in favor of plaintiffs for fifty-two hundred and forty-seven ($5,247.85) dollars, being five thousand and ninety-five dollars debt and one hundred and fifty-two (152.85) interest from Nov. 22, 1882.

By the court.

Indorsed: No. 31. May term, 1881. Adams *vs.* Orient Mutual Ins. Co. Judgment. Filed Nov'r 13, 1883, as of May 29, 1883.

56 *Bond on Supersedeas.*

In the Circuit Court of the United States for the Western District of Pennsylvania.

Know all men by these presents that we, The Orient Mutual Insurance Company, a corporation created by and existing under the laws of the State of New York, and Gordon Norris and Herman C. Schwab, are held and firmly bound unto John S. Adams and Charles F. Adams in the full and just sum of ten thousand dollars, to be paid to the said John S. Adams and Charles F. Adams, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, and each of us, and our and each of our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated at New York the sixth day of July, in the year of our Lord one thousand eight hundred and eighty-three.

Whereas lately at Pittsburgh, in the State of Pennsylvania, in a suit depending in the circuit court of the United States for the western district of Pennsylvania, in which John S. Adams and Charles F. Adams were plaintiffs and the said Orient Mutual Insurance Company was defendant, a judgment was rendered against the said Orient Mutual Insurance Company, and the said
57 Orient Mutual Insurance Company has obtained a writ of error to reverse the said judgment and lodged the same and copies thereof for the said plaintiffs in the clerk's office of the said court, and a citation citing and admonishing them, the said plaintiffs, to be and appear in the Supreme Court of the United States at a term to be held in the city of Washington on the second Monday of October next:

Now the condition of the above obligation is such that if the said The Orient Mutual Insurance Company shall prosecute its said writ of error to effect and answer all damages and costs if it fail to make its plea good, then this obligation is to be null and void; otherwise to remain in full force and virtue.

ORIENT MUTUAL INS. CO.,
By ALFRED OGDEN, [SEAL.]
Vice-Pres't.
G. NORRIL. [SEAL.]
HERMAN C. SCHWAB. [SEAL.]

Sealed and delivered and taken and acknowledged this 6th day of July, 1883, before me—

[SEAL.] EDWARD L. ORDER,
U. S. Commissioner for the Southern District of New York.

UNITED STATES OF AMERICA,
Southern District of New York, } ss:

Gordon Norril, being duly sworn, doth depose and say that he resides at No. 377 Fifth avenue, in the city of New York, in the
58 southern district of New York, and that he is worth the sum of ten thousand dollars over and above all his debts and liabilities and property exempt by law from execution.

G. NORRIL.

Sworn to before me this 6th day of June, 1883.

[SEAL.] EDWARD L. ORDER,
U. S. Commissioner for the Southern District of New York.

UNITED STATES OF AMERICA,
Southern District of New York, } ss:

Herman C. Schwab, being duly sworn, doth depose and say that he resides in the southern district of New York; that he is worth the

sum of ten thousand dollars over and above all his just debts and liabilities and property exempt by law from execution.

HERMAN C. SCHWAB.

Sworn to before me this 6th day of July, 1883.

[SEAL.] EDWARD L. ORDER,
U. S. Commissioner for the Southern District of New York.

Approved as to sufficiency of sureties.
July 6, 1883.

EDWARD L. ORDER,
U. S. Commissioner for the Southern District of New York.

Indorsed: No. 31. May term, 1881. J. S. & C. F. Adams *vs.* Orient Mutual Insurance Company. I approve the within bond for supersedeas of execution in the within stated-case. July 9, 1883. Joseph P. Bradley, justice of Supreme Court U. S. Bond. Filed July 12, 1883.

59 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the western district of Pennsylvania, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court before you or some of you, between John S. Adams, suing under the designation of J. S. Adams, and Charles F. Adams, suing under the designation of C. F. Adams, plaintiffs, and The Orient Mutual Insurance Company, defendant, a manifest error hath happened, to the great damage of the said defendant, The Orient Mutual Insurance Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the ninth day of July, in the year of our Lord one thousand eight hundred and eighty-three.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
JOSEPH P. BRADLEY,
Associate Justice of the Sup. C't, U. S.

59½ [Endorsed:] No. 31. May T., 1881. C. F. and J. S. Adams *v.* Orient Mutual Ins. Company. Writ of error. E. Filed July 12, 1883.

60 THE UNITED STATES OF AMERICA:

To John S. Adams, suing under the designation of J. S. Adams, and Charles F. Adams, suing under the designation of C. F. Adams, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western district of Pennsylvania, wherein The Orient Mutual Insurance Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Joseph P. Bradley, a justice of the Supreme Court of the United States, this ninth day of July, in the year of our Lord one thousand eight hundred and eighty-three.

JOSEPH P. BRADLEY,
Associate Justice of the Sup. C't, U. S.

60½ And now, July 12, 1883, we, the counsel of record for the plaintiffs in this case in the court below, do hereby accept service for said plaintiffs of the within citation and acknowledge to have received copies of the same.

ISAAC S. VAN VOORHIS,
D. T. WATSON,
Pl'ffs' Att'ys.

61 In the Circuit Court of the United States for the Western District of Pennsylvania. May Term, 1881.

J. S. & C. F. ADAMS
vs.
THE ORIENT MUTUAL INSURANCE COMPANY OF NEW YORK. } No. 31.

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

I, H. D. Gamble, clerk of the circuit court of the United States for the said district, do hereby certify that the annexed and foregoing pages contain a true copy of the record and proceedings in the above-entitled case so full and entire as the same remains of record and on file in my office.

In testimony whereof I have hereunto signed my name and

affixed the seal of the said court, at Pittsburgh, this 3rd day of Sept., A. D. 1883.

[Seal of the U. S. Circuit Court, W. D. Penn'a.]

H. D. GAMBLE, *Clerk.*

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

I, M. W. Acheson, U. S. district judge, presiding in the United States circuit court for said district, do hereby certify that H. D. Gamble, above named, was, at the time of making the above certificate, and is now, clerk of the said court, and that the said certificate made by him is in due form of law.

Pittsburgh, Sept. 3rd, 1883.

M. W. ACHESON,
Presiding as U. S. Circuit Judge.

Endorsed on cover: W. Pennsylvania C. C. U. S. No. 220. The Orient Mutual Insurance Company, plaintiff in error, *vs.* John S. Adams, suing under the designation of J. S. Adams, & Charles F. Adams, suing under the designation of C. F. Adams. Filed 26th December, 1883.

123-67

IN THE

Supreme Court of the United States.

OCTOBER TERM.—1886.

THE ORIENT MUTUAL INSURANCE CO.,
Plaintiff in Error,
vs.
JOHN S. ADAMS, *et al.*,
Defendants in Error.
No. 220.

IN ERROR TO THE CIRCUIT COURT OF THE WESTERN DISTRICT OF PENNSYLVANIA.

STATEMENT OF FACTS.

The defendants in error, as insured, sued the plaintiff in error, as insurer, in the Circuit Court, on a policy of marine insurance on the steamboat "Alice," to recover for a total loss.

The questions in the case are:

1*st*. Whether the loss, which was caused by the misconduct of the insured, is within the provisions of the policy.

2*d*. Whether the loss is within the express exceptions of the policy.

3*d*. Whether, if there was a loss, for which the insurer is liable, the insured had the right to abandon for a constructive total loss.

4*th*. Whether certain evidence was improperly excluded.

The insured introduced in evidence the policy,

which was in the usual form, and was for $5,000 on an agreed valuation of the "Alice" at $27,000, and contains these words:

"That there shall be no abandonment, as for a total loss, on account of said vessel grounding or being otherwise detained, or in consequence of any loss or damage, *unless the injury sustained be equivalent to fifty per centum of the agreed value of this policy;* that the aforesaid vessel is, and shall be at all times during the continuance of this policy, tight and sound, sufficiently found in tackle and appurtenances thereto, competently provided with master, officers, and crew, and in all other things and means, for the safe employment thereof."

"*In no case whatever shall the assured have the right to abandon, until it shall be ascertained that the recovery and repairs are impracticable, nor sell the wreck or any portion thereof, without the consent of this company.*" (Fol., 25 and 26).

"Warranted by the assured that this company shall be free from all claim for loss or damage occasioned * * by the bursting of boilers, the collapsing of flues * * * the derangement or breaking the engine or machinery, or any consequence resulting therefrom, unless the same be caused by unavoidable external violence." (Fol., 27).

The insurer introduced evidence tending to show, that on April the 28th, 1880, the master of the "Alice" was C. F. Adams, one of the defendants in error, a co-owner of the "Alice," and the son of the other defendant in error; that he had the reputation of being a drinking man and that his reputation was known to his father, the other co-owner, before the sailing of the "Alice" on her then trip; that the "Alice" arrived at Louisville early in the morning of April 28, 1880; that on her arrival the master gave the engineer the usual signal that he had no present need of the

engines; that the mud-valve was then out of order and threatened damage to the cargo, and that repairs were necessary; that it was necessary to blow off steam to make the repairs; that the steam was thereupon blown off to permit repairs to be made; that the master knew that repairs of the mud-valve were necessary and came on board and saw them going on; that he had drunk liquor that morning; that after seeing the repairs going on he went on deck, and without making inquiry of the engineer as to the condition of the steam, or receiving any signal or notice from the engineer as to the condition of the steam, he caused the "Alice" to be let go from her moorings; that her position then was such that if unmoored without steam on she would be carried over the falls; that there was not, at the time she was unmoored, sufficient steam in the boiler of the "Alice" to propel her; that she was carried by the current over the falls against a pier, and, in consequence of damage thereby received, sank in eighteen feet of water. (pp. 10, 11, 12).

The plaintiffs below introduced testimony tending to show, that on the 18th of May, 1880, they abandoned the "Alice" to the insurers as a total loss; that on that day it was apparently impracticable to float her off and repair her; that the damage done to her was equal to fifty per centum of the agreed policy (fol. 30); and that the whole insurance on the "Alice" was $18,000 (fol. 34.) The defendants below introduced evidence tending to show, *that the "Alice" was but slightly injured; that in the spring of* 1881 *she was floated and put into the condition in which she was before sinking for a little less than* $6,000. (Fols. 32, 33).

The defendants in error introduced in evidence the record of a suit in the United States District Court, under the proceedings in which suit the "Alice" was

sold to satisfy maritime liens existing on the 18th May, 1800 (Fol. 33).

ASSIGNMENT OF ERRORS.

Now comes the plaintiff in error, by James Lowndes, its attorney, and assigns for error the following matters, and prays a reversal of the judgment by reason thereof.

I. That the court erred in ruling that the loss being due to the misconduct of the insured, was within the provisions of the policy, and in refusing to rule that the misconduct of the insured discharged the assurer.

II. That the court erred in ruling that the loss was not within the express exception of the policy.

III. That the court erred in ruling that the insureds' right to abandon, as for a total loss, depended on the *probability*, on May 18th, 1880, of damage to the vessel equivalent to fifty per centum of her agreed value, and in refusing to rule that such right depended on the *actual fact* of that proportion of damage having been done to her.

IV. That the court erred in ruling that the fact of the actual repair of the vessel for less than fifty per centum of her agreed value was not evidence relevant to the issue of the amount of damage done to the "Alice."

ARGUMENT.

I. The loss was directly due to the misconduct of the insured himself, and was therefore not a loss insured against.

The contention of the plaintiff in error, is that a loss caused by the gross misconduct on the part of the

insured, is not a loss provided against by a policy of insurance; that there was in this case evidence of gross misconduct on the part of the insured; that it caused the loss and that the loss was therefore one for which the assured could not recover; or stating the principle in another form, the misconduct of the insured discharged the assured from liability.

The court below took a different view of the law, and its instructions and refusals in effect took away from the jury the consideration of the gross misconduct of the insured as a defence.

(Instructions, 3, 6, (p. 16); refusals, 8, 9, 10, 17, fols. 39, 41, 43, 45, 52).

The error consisted in not distinguishing between ordinary negligence on the part of the insured's agents and gross misconduct on his own part.

There is no dispute about the fact that Adams, the co-owner, ordered the "Alice" to be let go when she had not sufficient steam in her boiler, and that the damage resulted from that act of the assured.

The evidence further shows that he was put on inquiry as to the state of the steam. The vessel had been at her moorings for some time; he had been on shore (where he had drunk liquor); he knew that the mud-valve needed repairs; he saw the repairs making; he knew that the mud-valve was connected with the boiler; he knew that the vessel, in its position, would float over the falls if she were without steam. *With this knowledge, Adams, without inquiry as to the condition of the steam, caused the vessel to be cast off.*

The act, which in this case caused the disaster, was the *act of the owner*, and not of his agents. In the cases cited hereinafter, the discussions were chiefly as to the effect of the misconduct of the owners' *agents* in discharging the insurer. These cases are to be considered in connection with the principle, that acts,

which, when done by the *agent*, would discharge the insurer, would "*a fortiori*" discharge him when done by the assured himself.

"The insured is never to be indemnified against his own act, nor against any loss caused by his own personal misconduct."

Parsons, M. L. II, 210.

"Of course if the loss be referable to the act of the assured himself, the underwriter will "*a fortiori*" be discharged."

Arnould, p. 670.

The conduct of assured persons, in reference to this question, may be classified under three heads. At one extreme is conduct, which amounts to ordinary negligence. Such conduct, at least on the part of the agents of the assured, does not discharge the insurer. At the other extreme, is conduct which amounts to design or fraud. This, it is as clearly settled, does discharge the insurer. Between these extremes there is conduct, which differs in degree from the other classes, and which is difficult to be defined. It is sometimes designated misconduct, sometimes gross negligence, sometimes it is described in other terms. Gross negligence is, perhaps, the best technical description of it.

The authorities show that misconduct or gross negligence on the part of the assured, although falling short of fraud or designs, does discharge the insurer.

"The insured impliedly warrants that he will guard with reasonable diligence, against the risks covered by the policy so that a loss shall not happen through his own default and negligence; thus he must take care, in case of a policy on ship, that she be documented according to her national character,—for every ship must have same national character,—and the underwriters will not be liable if a loss happens from the default of the insured in being unprovided with those

documents which are required by the general law of nations, or by particular treaties; thus, as the carrying of simulated papers is an offence against the law of nations,—if a ship carry them,—*and* be condemned on that ground, the *warrantry of documentation* is infringed, and the underwriters are not liable."

Smith's Merchantile Law, page 469.

"I own I feel a doubt whether, if it were distinctly averred, that a ship had, by gross negligence, been brought, during the voyage, to a condition in which she would not be insurable, that might be a defence. It is certainly a new and, perhaps, a dangerous one; but I think if it were clearly made out, the assured could not say that the loss was by perils insured against." Per Lord Denman.

Hollingsworth *vs.* Brodrick, 7 Ad. and E. 40, page 470.

"Negligence which amounts to misconduct is not insured against. Misconduct is defined to be a transgression of some established and definite rule of action where no discretion is left except what necessity may demand as contradistinguished from negligence, carelessness, and unskillfulness, which are transgressions of some established but indefinite rule of action, where some discretion is necessarily left to the actor. Misconduct is a violation of definite law; carelessness, an abuse of discretion under an indefinite law.

"Misconduct a forbidden act; carelessness a forbidden quality of an act, and is necessarily indefinite."

May on insurance, pp. 495–6.

"But where the negligence is so gross as to squint at fraud, or to amount to posiiive misconduct and wrong-doing, as where a steamboat captain, in order to increase the speed of his boat for the purpose of winning a race, makes use of turpentine for fuel, and in consequence the boat takes fire and burns up, the insurer is not liable."

Beach on Contributory Negligence, p. 401.

"If the proximate cause of the loss be the negligence or misconduct of the assured or his agents, not amounting in the latter to barratry, it is a misfortune not covered by an ordinary policy. It is seldom, however, that cases are of such a nature as to be capable of being ranked under this principle. The exception ranks much more frequently. For if the proximate cause of the loss be some of the perils insured against, notwithstanding the negligence or misconduct of the assured or his agents (not amounting to barratry in the latter) was the condemning cause, the underwriter is liable. * * * *

"But where the loss is directly referable to the negligence or misconduct of the master, or other agents of the assured, not amounting to barratry, there seems little doubt that the underwriters would be thereby discharged."

Arnould on Marine Ins., 667, 669.

By the authority of the plaintiffs, (one of them being on board,) the ship was sent from the dock and harbor of Sunderland into an open roadstead, when from the state of the shrouds and other deficencies, she was unfit to carry sail or proceed on her voyage. The ship was lost; the insurer was held to be discharged.

Thompson *vs.* Hopper, 6 El. and Bl., 946.

A master, during a hard frost, had filled his boiler over night (according to custom) to prepare for starting in the morning, in consequence of which the boiler pipe burst, in consequence of which goods were injured. The insurer was discharged.

Scordet *vs.* Hall, 4 Bing., 407.

In a case in which the vessel was seized for violation of the revenue law, Lord Ellenborough said:

"This is a clear case of *crassa negligentia* on the part of the assured. It was the plaintiffs duty to have

prevented these repeated acts of smuggling by the crew."

Pipon *vs.* Cope, 1 Campbell, 434.

Where no pilot was taken on board, the insured was held to be discharged.

Law *vs.* Hollingsworth, 7 term, 160.

The failure to provide proper documents, discharged the insurer.

Bell *vs.* Carstairs, 14 East., 374.

Where a master sailed into port with a false bill of health, and his vessel was burnt, the insurer was discharged.

1 Emerigon CXII, p. 429.

Where a vessel might have been repaired and was not, the insurer was discharged.

Tamer *vs.* Bennett, R. and M., 182.

A loss caused by the owner not furnishing funds, discharged the insurer.

Am. Ins. Co. *vs.* Ogden, 20 Wend., 287.

The assured, in a policy against fire, may be guilty of such gross misconduct, not amounting to a fraudulent intent, to burn the building, as to preclude him from recovering for a loss of the same by fire.

Chandler *vs.* The Worcester.

3 Cushing, 338. Per. Shaw, C. J.

The insured cannot recover for a loss directly caused by the wrongful acts of himself or his agent.

Williams *vs.* N. E. Ins. Co., 3 Cliff., 244.

Where the damage might have been avoided by the use of ordinary care and diligence on the part of the ship, the insurers are not liable; the negligence, and not the perils of the seas, is then considered the proximate cause of the loss.

The Titania, S. D. N. Y., 19 Fed. Rep., 101.

Negligence of a master in failing to repair a vessel rendered unseaworthy, when reaching a port where

such repairs can be made, will exempt the insurers.

Hazzard *vs.* Ins. Co., 1 Sumner, 218.

"A vessel chartered to the United States was ordered, by the commanding general, to cross a bar when it was rash, hazardous, and unjustifiable to do so, and was lost, that the insurer was then discharged."

Williams *vs.* Ins. Co., 3 Cliff., 244; see also Hackfield *vs.* S. S. Costa Rica, 5 Ins. Journal, 396.

These citations suffice to establish the doctrine contended for, viz: that misconduct or gross negligence on the part of the assured's agents, and "*a fortiori*" on the part of the assured, discharge the insurer.

The misconduct of the assured in the present case which caused the present disaster was in a stronger sense gross negligence or misconduct than any of the acts held in the above case to be defences for the insurer.

In the case of Thompson *vs.* Hopper, (6 El. and Bl. 946,) the assured sent his ship into the roadstead, when, from the condition of the shrouds and from other deficiencies, she could not carry sail, and the vessel was lost. That case presents a strong analogy to the present one.

II. The court erred in refusing to rule that the damage was within the express exceptions of the policy.

The policy contains these stipulations:

"Warranted by the assured that this company shall be free * * from all claim for loss or damage occasioned by * * * the derangement or breaking the engine or machinery or any consequence resulting therefrom; * * * that the aforesaid vessel is, and shall be, at all times during the continuance of the policy, tight and sound, sufficiently found in tackle and appurtenances thereto, * * * completely provided with master, officers and crew, and in all other things, and means for the safe employment thereof." (Fol. 25).

The perils insured against are "of the seas, lakes, rivers, canals, fire, and jettisons."

The whole scope of the contract was to insure the owners against the accidents of navigation which should befall a properly equipped and completely manned vessel. The assurer warranted against damage which should result from navigation with the proper appliances.

The loss was "a consequence resulting from the derangement of the machines" within the language of the policy, because it was the consequence of the derangement of the mud-valve.

III. The assured was not entitled to abandon in this case as for a constructive total loss, because, under his contract, he could only abandon if the loss should actually be equivalent to fifty per centum of the agreed value in the policy, and there was no such actual loss.

The contract provides that there shall be no abandonment as for a total loss unless the injury sustained be equivalent to fifty per centum of the agreed value in the policy, (fol. 25,) and that in no case whatever shall the assured have the right to abandon until *it shall be ascertained* that the recovery and repairs of said vessel are impracticable (fol. 27.) The agreed value in the policy was $27,000 (fol. 22.) The vessel was raised and repaired for less than $6,000 (fol. 33).

There was, therefore, no such partial loss as under the contract authorized an abandonment for a constructive total loss.

The court, however, ruled that the assured was entitled to abandon as for a total loss.

The instructions and prayers on this point are contained in the 2d, 3d, 4th, and 13th Bills of Exception.

The jury was instructed as follows:

"Whether the injury to the "Alice," from the perils

of the river, equaled fifty *per centum* of her agreed value was a question to be determined on May 18th, 1880, taking into consideration the place where the "Alice" lay, and *the uncertainty as to when*, (if at all,) a rise would come to float her off, and all other circumstances in the case." (4th Bill, fol. 37).

"The right to abandon was to be determined by the facts as they existed on May 18th, 1880, and if the right then existed, and the plaintiffs availed themselves of the same, the subsequent floating off of the "Alice," in the winter or spring of 1881, would not change the rights of the parties." (2d Bill, fol. 38).

The difference between the principle ruled and that now contended for, is obvious. The former makes the *probability* of the stipulated loss, at the time of abandonment, the test of the right to abandon; the latter makes the actual existence of the stipulated proportion of loss the ground of the right to abandon.

The cases in which it has been held that the probability of a total loss is the ground of the right of abandonment, do not apply to the present case. Those were cases in which the right to abandon depended on positive rules of law, applicable in the absence of a contract. In the present case the parties have, by their formal contract, regulated the right of abandonment, and have, thereby, restricted it to the particular event of an *ascertained* actual loss of fifty *per centum* of the agreed valuation.

The principle applies to this case: "*quilibet potest renunciare jivie pro se introducto.*" Such renunciations are of frequent occurrence in the law of maritime insurance. An instance is the stipulation that in no case shall there be an abandonment for constructive total loss. There are like stipulations as to average. So in the present case, the assured has renounced his right to have the *actual* value, and not the agreed value, of the vessel taken as the basis of calculating

the proportion of damage. Such stipulations have been enforced without question.

The authorities sustain this view.

The assured cannot abandon on account of the imminent danger of a total loss.

Hall *vs.* Franklin Ins. Co., 9 Pick., 466.

In two cases the policies construed were similar to the present one, and the right to abandon was treated as dependent on actual loss.

Ins. Co. *vs.* Chase, 20 Pick., 142.

Reynolds *vs.* Ins. Co., 22 Pick., 191.

The stranding or submerging of a vessel is not necessarily a total loss: an abandonment under such circumstances is not binding on the insurers, nor are they concluded by the report of a surveyor, condemning her and recommending her for sale.

If they can repair for half her value, and take possession for that declared purpose, they may return her to the owner.

Wood *vs.* Ins. Co., 6 Pick., 479.

Ins. Co. *vs.* Chase, 20 Pick., 142.

Sewell *vs.* Ins. Co., 11 Pick., 90.

Where the assured in a policy on a ship which is stranded, and greatly damaged, offers to abandon her to the insurers, and refuses to repair her, it seems they may repair, and if the repairs are less than one half her value, return her to her owner.

Peele *vs.* Ins. Co., 7 Pick., 254.

In a case in which the language of the policy was identical with the present policy, it was held that both (insured and insurer) are at last bound by the test of the actual cost of raising and repairing the vessel, and by the construction which competent authority shall give to the terms of the parties.

Ins. Co. *vs.* Packet Co., 7 Ins. Law Journal, 557.

The assured had renounced in the plainest terms his larger right of abandonment; but the instructions ignored the contract and renunciation, and treated the case as one resting on the general rules of law.

An extreme case like this illustrates the importance of the stipulation in question. The contract of insurance is one of indemnity. The stipulation has the tendency to preserve this character of the contract, and to prevent its conversion into a conditional sale. It is a stipulation which promotes public policy, and should be favored, and should be liberally construed.

Independently of the error of ignoring the effect of the contract on the rights of the parties, the instructions were incorrect.

It is not merely a probability that the damage will reach fifty *per centum* of the agreed value, but the *highest* degree of probability that it will, which is ground of the right to abandon.

"The highest probability," "all human probability," are made the tests by Judge Story. (Bradlie *vs.* Ins. Co., 12 Pet., 378.) "The highest degree of probability" is the test proposed by Lord Ellenborough. (Anderson *vs.* Wallis, 2 M and Lelu, p.).

This criterion, viz, the highest degree of probability, was not proposed to the jury as applicable to the case of the "Alice." Not even the criterion of a "high degree of probability" was proposed. The jury could very well have understood the instuctions to mean that if there was a chance of the damage equaling fifty *per centum* of the agreed value, the owners could abandon.

IV. If the court was correct in ruling that there mere *probability* of the stipulation damage was the ground of the right to abandon, the fact that the vessel was actually raised and repaired for one quarter of the agreed value, was important evidence as to that

probability; the court erred in excluding evidence of that fact.

The court by its instructions, (in the 3 bill, fol. 30,) and its refusal, (in the 13th bill, fol. 48,) practically excluded the consideration of the fact from the jury; at the least, it misled the jury as to the value of the fact as evidence.

On the issue whether a thing can probably be done, the fact that it has been done is relevant. It is not conclusive, but it enables the reasoner to better measure the fact from which the probability is to be inferred.

On the issue whether the "Alice" was damaged to the extent of $13,500, the fact that she was damaged less than $6,000 was a fact which the insurer was entitled to have submitted to the jury.

"Unseaworthiness during a voyage is strong proof of unseaworthiness at its beginning."

East *vs.* Delaware Ins. Co., 2 Wash., C. C., 375.

It is submitted that the judgment should be reversed and the verdict set aside.

JAMES LOWNDES,
Attorney for Plaintiff in Error.

123-67

IN THE

Supreme Court of the United States,

October Term, 1886. No. 220.

THE ORIENT MUTUAL INSURANCE COMPANY, Plaintiff in Error and Defendant Below.

versus

JOHN S. ADAMS and CHARLES F. ADAMS, Defendants in Error and Plaintiffs Below.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

Brief of Defendants in Error.

ISAAC VANVOORHIS,
D. T. WATSON,
Attoneys for Defendants in Error.

PITTSBURGH, PA.
J. A. REED, BOOK & JOB PRINTER.
1887.

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STATEMENT OF THE CASE.

It is quite difficult to gather from the record the facts in this case. None of the testimony except the policy of insurance is returned, but taking that, and what the jury under the charge of the Court must have found, a brief statement of facts would be as follows :

On December 29th, 1879, the Orient Mutual Insurance Company, the plaintiff in error, issued to J. S. and C. F. Adams, the defendants in error, a policy of insurance upon the steamer "Alice," insuring her from noon of the 31st day of December, 1879, to noon of the 31st day of December, 1880, against the perils "of the sea, lakes, rivers, canals, fires and jettisons that shall come to the damage of the said vessel or any part thereof," during its navigation of the Ohio and other rivers.

On April 28th, 1880, the "Alice" was destroyed and sunk in the Ohio river near Cincinnati by a peril of the river. Every

effort was made by the owners to raise her but without success, and her loss being equivalent to fifty (50) per cent. of her agreed value in the policy ($27,000) and it being impracticable to recover and repair the vessel, on May 18th, 1880, the owners abandoned her and gave due notice to the insurance companies.

The total insurance on the vessel at that time was ($18,000) eighteen thousand dollars, represented in seven companies. All the companies except the Orient Mutual Insurance Company settled with the owners, and as part of that settlement, assigned to them all their (the insurance companies') interest in the vessel which they had gained by reason of the abandonment being the thirteen-eighteenths (13-18). Subsequent to the abandonment the vessel was libelled in admiralty on maratime liens and sold and the owners claimed and received the thirteen-eighteenths of the proceeds of the sale, being their proportion as representing the insurance companies which had settled with them. In the spring of 1881, more than one year after the abandonment, the steamer "Alice" was floated off by an extraordinary rise in the Ohio river.

The circumstances immediately preceding the accident to the "Alice" were in part in dispute in the Court below, but a fair statement of them is believed to be as follows :

The Alice was on a voyage down the Ohio river and stopped at the port of Louisville to receive and discharge freight. Landing at a barge belonging to the steamer "Annie Kelly," the Alice was tied up and the Master went on shore. Then the engineer, because the mud valve or mud drum was leaking, in order to repair it, blew off steam. The Master returned to the Alice and either saw the engineer repairing the mud valve or knew such repairs were being made. The Insurance company claimed that in order to make such repairs it was necessary to blow off steam and that the Master knew the steam had been so blown off, while the owners claimed that it was wholly unnecessary to blow off steam to make such repairs and denied that the Master knew steam had been blown off. After the repair of the mud valve was completed, the Master rang the bell to get ready and afterwards the bell to let her go. The Insurance company claimed that it was the duty of the Master before

ringing the bell to let go, to have inquired of the engineer if there was sufficient steam to stem the current while the owners claimed there was no such duty on part of the Master, but on the contrary, if the engineer did not have sufficient steam it was his duty to have so notified the Master. The vessel drifted into the river, the Master making every effort to land her, but without success, and the steam being insufficient to stem the current, she was carried over the falls and sunk in about eighteen feet of water.

The mud valve or drum is an attachment to the boiler used only for the purpose of cleaning the boilers from mud and filth and water. It is not connected with the engines or machinery of the boat and the boat can be navigated with perfect safety with the mud valve leaking.

On the trial in the Court below, the case turned (under the rulings of the Court) on questions of fact, all of which were found by the jury in favor of the defendants in error.

ASSIGNMENTS OF ERROR.

Section 997, of the Revised Statutes, requires that there shall be annexed to and returned with the writ of error "An Assignment of Errors." Section 4, of rule 21, of this Court, provides "When there is no assignment of errors as required by section 997, of the Revised Statutes, counsel will not be heard except at the request of the Court, and errors not specified according to this rule will be disregarded, but the Court at its option may notice a plain error not assigned or specified."

The plaintiff in error has not complied with the Revised Statutes in this respect. The assignments of error are not annexed to or returned with the writ of error.

The "brief" of the plaintiff in error has four (4) assignments of error, no one of which is in accordance with rule 21, which says: "When the error alleged is to the charge of the Court, the specification shall set out the part referred to, *totidem verbis*, whether it be instructions given or instructions refused."

It is not desired to take advantage of a failure to comply strictly with the rules, but the utter disregard of them in this case leads to misapprehension as to what the Court below did charge.

POINTS OF LAW.

First.—The first Assignment of Error is in these words :

"That the Court erred in ruling that the loss being due to the misconduct of the insured was within the provisions of the policy, and in refusing to rule that the misconduct of the insured discharged the answer."

A disregard of the rules of this Court in the Assignment of Errors requires us to insert here at length what the Court did rule as to the *misconduct* of the *insured.*

The sixth bill of exception contains the following request and the following answer to it :—

"The mere fault or negligence of the captain of the vessel, by which the Alice was drifted into the current and drawn over the falls, will not constitute a defence for the company, unless the jury should be satisfied that the captain acted fraudulenty or willfully with design in so doing."

Which prayer was affirmed.

The seventh bill of exception contains the following request and the following answer :—

"If the jury should find under all the evidence in the case, that under the established custom of the river the engineer should not have exhausted the steam on the Alice on the morning of April 28th, 1880, without notifying the pilot or captain, and that at a landing such as the Alice made at the barge Annie Kelly it was not the custom of the captain to receive notice from the engineer before letting the boat go that he (the engineer) was ready and had steam, then the captain of the Alice, on the morning of April 28th, 1880, if he was without knowledge that the steam

had been exhausted, was not guilty of any such fraudulent or designed action as would constitute a defence to this action."

Which prayer was denied, but the Court instructed the jury as follows :

If the jury find the facts as herein stated the captain of the Alice was not guilty of such fraudulent or designed action as would constitute a defence to this action.

The following requests were made by the plaintiff in error:

The eighth bill of exception contains the following request and the following answer to it :—

"If the jury are satisfied from the evidence that the accident and loss was caused by the misconduct of Captain Charles F. Adams that then the plaintiff cannot recover."

Which prayer the Court refused, but instructed the jury as follows :—

"That is true if the jury is satisfied that the conduct of the captain is properly characterized. If he designedly or recklessly exposed the boat to the dangers of navigation at the falls, knowing that she was not in a condition to encounter them, he was guilty of misconduct such as would relieve the defendant from liability; but if the proximate cause of the loss was the stranding of the vessel this was covered by the policy, and the defendant is not relieved from liability by showing that the loss was remotely ascribable to the negligence of the captain or the other officers or employes."

The ninth bill of exception contains the following request and the following answer :—

"If the jury are satisfied from the evidence that the accident happened in the manner detailed by Captain Charles F. Adams in his written report of the accident made on May 1st, 1880, to the local inspectors of steamboats for the port of Louisville, Kentucky, to wit: "That after discharging the Louisville

freight at the wharf boat we then dropped down to the barge of the steamer Annie Kelley, where she received 20 barrels of oil and four cook stoves and fixtures, expecting to go immediately over the falls when all our freight was on board. When about ready to start the mate informed me that a joint had blown out of the mud valve. I walked to where the engineers were repairing it, and waited until they had finished repairing it. I then went forward and rang bell for them to get ready. I then walked upon the roof and rang my bell to let her go, supposing all was ready. I then ordered the pilot to come ahead on her, when the engineer sounded through the trumpet he had no steam; the lines had all been let go, and the boat was then at the mercy of the current; but we managed to get a line ashore, but too late to do any good, as the current was so strong that it parted our line, and we drifted over the dam and down the river against the bridge, when we struck the pier, knocking a hole in her side forward of the larboard cylinder, also knocked her chimneys down; then we drifted on down to near the cement mill, where we struck the bank and sunk in about fifteen feet of water. Previous to striking the bridge the anchor was thrown over, but failed to do any good. All due exertions were made to save the steamer." That then the conduct and acts of the captain shows either misconduct or incompetency, and the verdict should be for the defendant."

Which prayer the court refused.

The tenth bill of exception contains the following request and the following answer to it :—

"That the following statement made by Captain Charles F. Adams to the United States local inspectors of steamboats for the port of Louisville, Kentucky, in his testimony before them on the 4th day of May, 1880, shows gross misconduct on the part of the Captain in the navigation and control of the vessel, to-wit: "About 5 o'clock A. M. we landed at the wharf boat, at the foot of Fourth street, to put off some Louisville freight. We laid at the wharf boat until about 8:30, when we dropped down to the barge of the steamer Annie Kelly, lying about the foot of Fifth street, for the purpose of taking on some freight. We

laid there only ten or fifteen minutes. I went ashore, and returning shortly afterwards, the mate told me the engineers had some repairs to make. I went back and found a joint had blown out of the mud valve. I then waited until they were done. I then went forward and rang my bell for them to get ready, supposing they had steam enough to stem the current to get from the landing. I then went upon deck and rang the bell to let go, which was done."

Which prayer was refused.

The abstract proposition of law the Court in the foregoing answers declared was that the mere fault or negligenceot the captain would not constitute a defense unless the Captain acted fraudulently or wilfully, but the Court affirmed the request embraced in the Eighth Bill of Exceptions, that it "the *misconduct* of the Captain" caused the loss the owners could not recover. The Court added that "if he (Captain) *designedly or recklessly* exposed the boat to the dangers of navigation at the falls, knowing that she was not in a condition to encounter them, he was guilty of *misconduct*, such as would relieve the defendant from liability."

It is submitted that error (if there be any) was in adopting a rule too favorable to the Insurance company, in relieving it, for even if the Captain had been "reckless" in exposing the vessel to the danger of navigation—it would not have released the Insurers.

The following considerations and authorities would seem to fully sustain the position that the Court below committed no error against the Insurer.

(a) Admittedly the "Alice" was lost by a peril of the river—for she went over the falls, ran against a pier of a bridge and sank in deep water.

This being so, and a peril of the river being the *proximate* cause of the loss, the fact (if such it be) that the negligence of the Captain or crew *remotely* subjected the vessel to the peril

will not constitute a defence to the action. Really this proposition decides this case.

* * * A loss the proximate cause of which is a peril insured against is a loss within the policy, although the remote cause may be negligence of the masters or mariners. * *

Patapsco Insurance Co. vs. Coulter, 3 Peters, 222. Waters vs. Merchants' Louisville Insurance Co., 11 Peters, 218. Columbia Insurance Co. vs. Lawrence, 10 Peters, 517. General Mutual Insurance Co. vs. Sherwood, 14 Howard, 361. American Insurance Co. vs. Insly, 7 Penna. st., 230. Wilson vs. Suffolk Insurance Co., 8 Cushing, 496. Ins. Co. vs. Transportation Co., 12 Wallace 199.

(b) The act of the Captain or crew which would release the Insurer is not mere negligence or carelessness, but it must amount to *fraud or design.*

* * * "*Negligence of servants or of the tenant is no defence, nor of the proprietors, unless of such a character as to sustain the imputation of fraud or design.*"

Patapsco Insurance Co. vs. Coulter, 3 Peters, 222. Phœnix Insurance Co. vs. Erie Transportation Co., 117 U. S., 323. Catlin vs. Springfield Insurance Co., 1 Sumner, 454. Williams vs. Suffolk Insurance Co., 3 Sumner, 276.

(c). The negligence of the owner is no more a defence to the policy than the negligence of his servants or agents. That is the Insurer to successfully defend must show fraud or design.

This Court so held in Patapsco Insurance Co. vs. Coulter, 3 Peters, 222, when it classed the *proprietors* with servants and agents and governed by the same rule. In the latest case where this question was considered, that of the Phœnix Insurance Co. vs. Erie Transportation Co., 117 U. S., 323, 324, 325, this Court assumed the correctness of that rule, and there cited approvingly the case of the North British Insurance Co. vs. London, Liverpool and Globe Insurance Co., 5 Ch. D., 569, 584, where it was unquestioned that a loss occasioned by the *owners'* negligence would be covered by the policy.

In the American Insurance Co. vs. Insly, 7 Penna. State, 229,

C. J. Gibson, stating that the English cases holding that mere negligence would relieve the Insurer are overruled, added:

"Public policy requires no more than that a man be not suffered to insure against his own knavery, which is not to be protected or encouraged by any means; for though the maxim *respondeat superior* is applicable to the responsibility of a master for the acts of his servants, yet the insured, so long as he acts with fidelity, is answerable neither for his servants *nor for himself*."

Phœnix Insurance Co. vs. Cochran, 51 Pa. St., 152. Johnson vs. Berkshire Insurance Co., 4 Allen, 388. Theobald vs. Railway Assurance Co., 10 Exchequer, 45. Phillips vs. Insurance, page 599, Sec. 1846.

(d) If the facts were as assumed in the requests to charge contained in the ninth (9th) and tenth (10th) Bills of Exceptions (Record pages 18, 19) it did not show misconduct or fraud or design (or even negligence as we claim) on part of the captain.

The report and portions of Capt. Adams' testimony embodied in those requests briefly show—that the "Alice" had received certain freight at the barge of the steamer "Annie Kelly," and was ready to start when the mate informed him the engineers were repairing the mud valve. He (Captain) waited until the repairs were completed and then "rang the bell for them to *get ready*" (page 18) "supposing they had steam enough to stem the current to get from the landing" (page 19). He then went up on deck and rang the bell to let her go—and the lines were thrown off. *Then, and not until then*, the engineer sounded through the trumpet he had no steam.

The defendants in error on the trial in the Court below, gave evidence tending to show that by a usage of the Ohio river (pages 14, 15) the engineer gives the captain notice of exhausting steam, and that unless such notice was given the captain assumes the vessel has sufficient steam to safely navigate any part of the river.

On the contrary the Insurer (page 14) gave evidence tending to show—that it was the custom of the river for the captain to in-

quire of the engineer if he had steam before giving the order to let go. The Insurer claimed the captain knew that steam had been blown off and the insured denied the claim.

After the engineer's warning every effort was made to save the vessel but without avail—a line was got ashore but the current was so strong it parted and the anchor was thrown over, but failed to do any good. All due exertions were made to save the steamer.

It would seem that no argument is needed to prove that such a state of facts does not show either fraud or misconduct, or reckless conduct on part of the captain.

If the custom of the river was that the engineer at a temporary landing is bound to notify the captain if he has not sufficient steam, then it was not even negligence in the captain, but it *was* negligence in the engineer. The jury seemed to have found in favor of such custom.

If on the contrary the captain should have by the usage and customs of the river inquired of the engineer if he had steam, but did not do so, this is not fraud nor misconduct, but negligence. Capt. Adams was not a prohibitionist but the Insurer did not even pretend after the proof was in that he was on this occasion in the least under the influence of liquor. He did use liquor, but not in immoderate quantities.

In Levi vs. New Orleans Insurance Co., 2 Woods (Circuit Court) Report 64, a case before Mr. Justice Woods, the action was for the loss on a marine policy, and one of the defences was that the loss occurred through such fault on part of the officers of the vessel as relieved the Insurance company from liability. It is quite a parallel case and we cite at some length. Mr. Justice Woods said:—

"It is the settled rule that negligence and carelessness are insured against, while misconduct, which is a violation of definite law, a forbidden act, is never insured against." Flanders on Fire Insurance, 2 Ed., 553; Citizens Ins. Co. vs. Marsh, 5 Wr., 386; Johnson vs. Berkshire Insurance Co., 4 Allen, 388; The Phœnix Ins. Co. vs. Cochran, 51 Penn. St., 148; Chandler vs. Worcester Fire Ins. Co., 3 Cush., 328; Goodman vs. Harvey, 4 Adol & Ellis, 870.

"In the Columbian Ins. Co. vs. Lawrence, 10 Peter, 507, Judge Story says: "The next question is whether a loss by fire occasioned by the faults or negligence of the assured, their servants and agents, but without fraud or design on their part, is a loss for which the underwriter is liable." In regard to marine insurance cases, this was a question much vexed in the English and American courts. "But in England the point was completely settled in Bush vs. The Royal Exchange Ins. Co., 2 Barn. and Ald., 82, upon the general ground that *causa proxima, et non remota spectatur;* and therefore that a loss whose proximate cause is one of the enumerated risks in the policy is chargeable to the underwriters, although the remote cause may be traced to the negligence of the master and mariners. The same doctrine was afterwards affirmed in Walker vs. Maitland, 5 B. & Ald., 171, and Bishop vs. Pentland, 7 Barn & Cres., 219, and is now deemed incontrovertibly established. The same doctrine was fully discussed and adopted by this court in the case of the Patapsco Ins. Co. vs. Coulter, 3 Peter, 222; see also St. Johns vs. Ins. Co., 1 Duer, 371; Hynds vs. Schenectady Ins. Co., 16 Barb., 119; Gates vs. Madison Ins. Co., Seld., 469; Catlin vs. Ins. Co., 1 Sumn., 434; Mathews vs. Howard Ins. Co., 13 Barb., 234. These authorities establish conclusively the doctrine that mere carelessness and negligence of the master and officers of a boat do not relieve the insurance companies from liability for a loss occasioned thereby.

"The question remains, were the officers of the Sabine guilty of misconduct, or of carelessness and negligence only? Misconduct is defined to be a transgression of some established and definite rule of action, where no discretion is left except what necessity may demand, as contradistinguished from negligence, carelessness and unskillfulness, which are transgressions of some established but indefinite rule of action, where some discretion is necessarily left to the actor. Citizens Ins. Co. vs. Marsh, 41 Penn. St., 386.

"I think no better illustration could be given of what constitutes carelessness, negligence, and unskillfulness as distinguished from misconduct, than the conduct of the pilot of the Sabine, which caused the collision by which she was lost. He failed and neglected to follow a custom of the river, well known and estab-

lished, but not prescribed by any positive law. That custom was that ascending boats should run under the points near the shore, so as to avoid the current, while descending boats followed the main channel or thread of the river, so as to take advantage of the current. "The neglect by the pilot of the Sabine to observe this rule resulted in the collision. But this was no misconduct; there was no willful violation of positive law. If the pilot could see along the bank of the river for a long distance, and there was no boat coming in an opposite direction, there was no positive law of the river to forbid a descending boat from running near the shore. But the fault was he ran near shore at night, and when rounding a point where, if he happened to meet an ascending boat, there was danger of collision. This was negligence, carelessness, and unskillfulness, but it was not willful misconduct.

"I cite two instances of misconduct taken from reported cases, which will show how far the conduct of the pilot of the Sabine falls short of misconduct. The captain of a steamer, while racing, for the purpose of making more steam, brought from the hold of the vessel a barrel of turpentine, knocked out the head and placed it so near the furnace that the fire was communicated to the wood upon which the turpentine was thrown, and then to the barrel; such manner of use of turpentine being in contravention of an act of Congress. This, as matter of law, was held to be misconduct, and to avoid the policy.

"In Chandler vs. Worcester Insurance Company, Shaw, Chief Justice, puts the case of a party insured, standing by the fire, which was yet so trifling that by throwing on a cup of water which was at hand, the fire might be extinguished, and yet neglecting to do so, as a case of misconduct, which would avoid a policy." 3 Cush., 328.

"The case of the Sabine is not like either of the cases just mentioned. There was no willful violation of a positive law, nor was there such gross negligence as to amount to misconduct.

"I am of opinion, therefore, that the first ground of objection to a recovery is not well taken."

This Court has not before it the facts of exactly how the loss in this case was caused. What was the custom of the river? Should the captain have inquired of the engineer before tapping his bell to let go, or should the engineer have notified the captain of the exhaustion of steam? The answer to this is quite material to the decision of the case.

Just the location of the Alice—the point where she went over the falls, and the distance from it—the amount of steam it would have required to get her out from the landing and run the falls at the proper place—the efforts that were made to get her back to land—how this casting ashore of a line which broke diverted her—these and many others are material facts necessary to a decision of the question of the captain's negligence. Being in dispute they were properly left to the jury—under the instruction the Court below gave.

There is no such distinction in the cases as claimed by the plaintiff in error between ordinary negligence, which will not release the Insurer, and gross negligence, which will. The distinction is between *negligence* of all degrees (slight, ordinary or gross) on the one hand, and misconduct or fraud or design on the other.

Patapsco Ins. Co. vs. Coulter, 3 Peters, 222.

"Losses that are attributable to to any of the perils insured against, though occasioned by the negligence or misconduct of the agents of the assured, *not amounting* in the latter *to barratry*, are covered by an ordinary policy."—2 Arnold on Ins.; 758.

A very large number of cases are then cited to prove this rule on pages 758 to 765, and on the latter page it is said nothing but *criminal* negligence—that is, "so gross as to be clearly fraudulent," (page 762) will relieve the Insurer.—3 Kent's Com., Star Page 307 (11th ed.).

In May on Insurance, sections 409, 410, 411, it is said that no degree of negligence constitutes a defence unless it "raises a presumption of bad faith amounting to *fraud* or *design*."

This Court has but lately discouraged degrees of negligence, and in the case of the Railroad Company vs. Lockwood, 17 Wallace, 382, said:

"We have already adverted to the tendency of judicial opinion adverse to the distinction between gross and ordinary negligence. Strictly speaking, these expressions are indicative rather of the degree of care and diligence which is due from a party and which he fails to perform, than of the amount of inattention, carelessness or stupidity which he exhibits. If very little care is due from him, and if he fails to bestow that little, it is called gross negligence. If very great care is due, and he fails to come up to the mark required, it is called slight negligence. And if ordinary care is due, such as a prudent man would exercise in his own affairs, failure to bestow that amount of care is called ordinary negligence. In each case, the negligence, whatever epithet we give it, is failure to bestow the care and skill which the situation demands; and hence it is more strictly accurate, perhaps, to call it simple 'negligence,' and this seems to be the tendency of modern authorities. If they mean more than this, and seek to abolish the distinction of degrees of care, skill and diligence required in the performance of various duties and the fulfillment of various contracts, we think they go too far; since the requirement of different degrees of care in different situations is too firmly settled and fixed in the law to be ignored or changed."

Second.—The second assignment of error is:

"That the Court erred in ruling that the loss was not within the express exception of the policy."

To what portion of the charge of the Court, or to what question under the policy, this refers is not stated, but I assume from the argument it is to the clause providing that the Insurer shall not be held "from any loss or damage occasioned by said vessel being improperly laden, by the bursting of boilers, the collapsing of flues, explosion of gunpowder, the derangement or breaking the engine or machinery, or consequences resulting therefrom, unless the same be caused by unavoidable external violence" This exception affords no protection to the company in this case, because:

(a.) The mud valve which leaked was not a derangement of "*the engine or machinery.*" (b.) If it was, its derangement did

not cause the loss, but such loss was caused by *the want* of steam. (c.) The loss was not a "consequence resulting from" the leaking of the mud valve.

The mud valve, or mud drum, is an attachment to the boiler by which it is cleaned. It is not connected with the engine nor with any of the "machinery" of the boat.

Webster defines machinery—

(1.) Machines in general.

(2.) The working parts of a machine, engine or instrument arranged and constructed so as to apply and regulate force—as the machinery of a watch.

The mud valve has nothing to do with the "working parts of a machine."

The words of the policy are loss from the "bursting of boilers, collapsing of flues, * * * the derangement or breaking the engine or machinery."

The specification of "boilers" separate and apart from "machinery" would seem to show that the Insurer himself did not include "boilers" in the word "machinery." If so, how could it include a mere contrivance to cleanse the boiler?

(b.) The derangement of the mud valve did not cause the loss, nor is there any evidence that it did. It was the want of steam, rendering the vessel unmanageable in the current. How long it took to get up steam—how much steam was required—whether the engineer had time to make steam before the Master ordered her let go—would have to be determined to get at the real cause of the loss.

(c.) The fact that the vessel was by the force of the current carried over the falls, was not a "consequence" resulting from the derangement of the mud valve.

This means a proximate and not a remote consequence. If from the leaking of the mud valve the loss of control of the machinery *always* followed, it might be cause and effect, but there is no pretence of such a state of facts.

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In Jonides vs. Universal Marine Insurance Company, 14 C. B. (N. S.) 288, the phrase construed was "free from *all* consequences of liabilities." It was held to mean the proximate, not the remote consequences.

In the case at bar the expression is "or any consequences resulting therefrom."

If the engineer had not exhausted the steam the Alice would have stemmed the current.

Evidently some persons' negligence, the Master or engineer, intervened between the blowing off steam and the accident.

There was no evidence to show that the leakage of the mud valve deranged the machinery or in any way affected the moving of the boat, but on the contrary, the proof of the Insurance company merely tended to show that the leaking of the mud valve *threatened* damage to the freight. (See page 14 of Record.)

Third.—The third assignment of error is:

"That the Court erred in ruling that the insured's right to abandon as for a total loss depended on the *probability*, on May 18th, 1880, of damage to the vessel equivalent to fifty per centum of her agreed value, *and in refusing to rule* that such right depended on the actual fact of that proportion of damage having been done to her."

The importance of the rule of this Court requiring the Assignment of Error, to give the language of the Court, which is alleged to be erroneous, is significantly shown by this assignment, for it would have demonstrated that the assignment was not sustained by the facts.

The second bill of exceptions contained the request of the plaintiff below to this effect:

If the jury should believe under all the evidence that on May the 18th, 1880, it was impracticable to recover and repair the "Alice," and that the damage done to the Alice from the perils of the river amounted to a sum equal to fifty per centum of the agreed value in the policy of insurance ($27,000), then the plain-

tiffs under the terms of the policy were entitled to abandon said vessel."

This the Court affirmed.

The second point was :

"The right to abandon was to be determined on the facts as they existed on May the 18th, 1880, and if the right then existed and the plaintiffs availed themselves of the same, the subsequent floating off of the Alice in the winter or spring of 1881 would not change the result."

This the Court affirmed.

The third point was :

"Whether the injuries to the Alice from the perils of the river equalled fifty per centum of her agreed value was a question to be determined on May the 18th, 1880, taking into consideration the place where the Alice lay and the uncertainty as to when (if at all) a rise would come to float her off, and *all* other circumstances in the case."

This the Court also affirmed.

Nowhere in either of these points is the word "*probable*" used. It was the fact, as we claimed and introduced evidence to show (Record, page 13), that the damage done to her was equal to fifty per centum of her value. The particulars of her condition are not given in the Record, but the effect of the evidence is. The Insurer itself proved (page 14) that she was carried over the falls "and was struck against a pier and *badly damaged;* and that in consequence of this damage she *sank* soon thereafter below the bridge in about eighteen feet of water." The Insurer below gave no evidence (see Record, page 14,) as to what the damage to her on May the 18th, 1880, was. Their only evidence on this was that one year afterwards in the spring of 1881 she "floated off" and was repaired for $6,000, and they claimed she was as good when repaired as before. We denied that she was near as good and the Insurer below put no *point to the Court on* this question. There was no request whatever made by the Insurer in the Court below to charge that it was the "*actual fact*" of half damage, and not the probability of it

which governed. In the eleven (11) requests to charge presented by the defendant below no such point is even hinted at. The only point on this was in the thirteenth bill of exception (page 20) and is in these words :

"That if the jury are satisfied from the evidence that the "Alice" was recovered and repaired that the fact that the same was done is *the best evidence that it was practicable to recover and repair the boat.*"

This the Court refused; but it will be noticed this does not touch the question *of the amount of damage* but only the question of whether it was *practicable* on May 18th, 1880, "*to recover; and repair the boat.*" Surely that the boat was floated off in the spring of 1881 was not "the *best evidence*" that it was practicable one year before to recover and repair her.

The fact is, no such point was made or argued in the Court below, as is now attempted under the third assignment of error, and therefore, even if the point was good it will not be considered here. Wilson vs. McNamee, 102 U. S., 574; Belk vs. Meagher, 104 U. S., 279; Clark vs. Fredericks, 105 U. S., 4; Marion Bank vs. Fulton Bank, 2 Wallace, 254.

The Court below committed no error in charging in effect that whether the damage to the Alice was equivalent to one half of her agreed value ($27,000) was to be determined on the day of her abandonment, May 18th, 1880, taking into consideration *all the circumstances of the case.*

The policy of insurance does not prohibit an abandonment for a constructive total loss, but merely provides in reference thereto as follows (page 11): "That there shall be no abandonment as for a total loss on account of said vessel grounding or being otherwise detained, or in consequence of any loss or damage unless the injury sustained be equivalent to fifty per centum of the agreed value in this policy."

And again (page 12) :

"That in no case whatever shall the assured have the right to abandon until it shall be ascertained that the recovery and repairs of said vessel are impracticable."

Whether then on May 18th, 1880, the day the owners abandoned, they could, under their contract, do so, depended on two questions: (a) Is the injury sustained by the Alice "*equivalent* to fifty per centum of the agreed value in this policy?" (b). Has it been "ascertained that the recovery and repairs of said vessel are impracticable?" Not "*impossible*" but "*impracticable?*"

If the injury then was equal to fifty per centum of her agreed value, and if it was then *impracticable* to recover and repair her, the owners might abandon and the jury have found on this for the owners. The plaintiff below (owners) gave evidence tending to show the affirmative of both these questions (page 13), but the plaintiff in error gave *no evidence whatever* on what the injury to the Alice was *on May 18, 1880*, or whether it was *then* practicable to recover and repair her—except that one year afterwards, in the spring of 1881, she was floated off and then repaired.

It will be recollected that the Alice sank on April 28, 1880, and under the policy it became the duty of the owners to "use every effort" for her recovery; at once a wrecking company was employed to raise her, and it was not until May 18, 1880, the owners determined it was "impracticable" to recover and repair her and abandoned her. Ample time was *taken* to ascertain whether it was practicable to raise her, and the Insurer offered no evidence whatever to show that it was then practicable to raise her or that her injury was less than fifty per cent. of her value. It will be noticed that the word "ascertained" is used as to the *practicability* of her recovery; not the positive determined fact of inability to recover, but the practicability of it. That is, as the definition of the word (Webster) shows, incapable of performance under all the then circumstances of the case.

The Insurer had the right, under the policy (page 12), to "interfere and recover said vessel and cause the same to be repaired for account of the insured," and if on May 18, 1880, it was practicable to do so, and the loss was so small, why was it not done by the Insurer?

The rulings of the Court below seem to be fully sustained by the American authorities.

In Rhinelander vs. Insurance Co. of Penna., 4 Cranch, 45 Marshall, C. J., delivering the opinion of the Court said:

"* * * The state of loss at the time of the abandonment must fix the rights of the parties to recover on an action afterwards brought."

In Bradlie vs. The Maryland Insurance Co. 12 Peters, 397 this Court said:

"* * * It is material to remark that, by the well-settled principles of our law, the state of the facts, and not the state of the information at the time of the abandonment, constitutes the true criterion by which we are to ascertain whether a total loss has occurred or not, for which an abandonment can be made. If the abandonment, when made, is good, the rights of the parties are definitively fixed, and do not become changed by any subsequent events. If, on the other hand, the abandonment, when made, is not good, subsequent circumstances will not effect it, so as, retroactively, to impart to it a validity which it had not at its origin. In some respects our law on this point differs from that of England; for, by the latter, the right to a total loss vested by an abandonment, may be divested by subsequent events, which change that total loss into a partial loss. It is unnecessary to cite cases on this subject, as the diversity is well known; and the courts in neither country have shown any disposition of late years to recede from their own doctrine. The cases of Rhinelander vs. The Insurance Company of Pennsylvania, 4 Cranch, 29; and Marshall vs. The Delaware Insurance Company, 4 Cranch, 202, are different affirmations of our rule; and those of Bainbridge vs. Nealson, 10 East, 329; Patterson vs. Ritchie 4 M. & Selw. 394, and McIver vs. Henderson 4 M. & Selw. 584 of the English rule.

In cases where the abandonment is founded upon a supposed technical total loss, by a damage or injury exceeding one-half the value of the vessel, although the fact of such damage or injury must exist at the time, yet it is necessarily open to proofs to be derived from subsequent events. Thus, for example, if the repairs, when subsequently made, clearly exceed the half

value, it is plain that this affords one of the best proofs of the actual damage or injury. *On the other hand, if the subsequent repairs are far below the half value, this, so far as it goes, affords an inference the other way. But it is not, and in many cases cannot be decisive of the right to abandon.* In many cases of stranding, the state of the vessel at the time may be such, from the imminency of the peril, and the apparent extent of expenditures required to deliver her from it, as to justify an abandonment; although by some fortunate occurrence she may be delivered from her peril without an actual expenditure of one-half of her value after she is in safety. Under such circumstances, if, in all human probability, the expenditures which must be incurred to deliver her from her peril are, at the time, so far as any reasonable calculations can be made, in the highest degree of probability, beyond half value, and if her distress and peril be such as would induce a considerate owner, uninsured, and upon the spot, to withhold any attempt to get the vessel off, because of such apparently great expenditures, the abandonment would doubtless be good. It was to such a case that Lord Ellenborough alluded, in Anderson vs. Wallis, 2 M. & Selw. 248, when he said: "There is not any case, nor principle, which authorizes an abandonment, unless where the loss has been actually a total loss, or in the highest degree probable at the time of the abandonment."

"Mr. Chancellor Kent, in his learned commentaries vol. 3, 321, has laid down the true results of the doctrine of law on this subject. "The right of abandonment," says he, does not depend upon the certainty, but on the high probability of a total loss, either of the property or of the voyage or both. The insured is to act, not upon certainties, but upon probabilities, and if the facts present a case of extreme hazard, and of probable expense, exceeding half the value of the ship, the insured may abandon; though it should happen that she was afterwards recovered at a less expense."

"The right of abandonment does not depend upon the certainty but upon the high probability of a total loss of all of the property, or the voyage, or both. The Insured is to act not upon certainties but *upon probabilities*, and if the facts

present a case of extreme hazard and of probable expense exceeding half the value of the ship the Insured may abandon *though it should happen that she was afterwards recovered at a less expense. * * * The right to abandon exists when the ship for all useful purposes of the voyage is gone from the control of the owner; as in case of submersion, or shipwreck, or capture, and it is uncertain, or the time unreasonably distant, when it will be restored in a state to resume the voyage.*"

Third—Kents commentaries (star pages) 321, 323, 324, and cases cited.

In Arnould on insurance, vol. 2, page 987, the rule in the United States is stated thus:

"The facts *as they exist at the time when notice of abandonment is given must be such as to justify it;* but if they be such, then the rule is, that an abandonment once rightfully made is binding and conclusive between the parties, and the rights flowing from it become vested rights, and are not to be divested by any subsequent event."

On page 988 (citing Judge Story in Peele vs. Merchants Ins. Co., 1 Mason, 27) one of the grounds authorizing an abandonment is, "*where there is a present total loss of the physical possession and use of the ship as in case of submersion.*"

Fourth.—The fourth assignment of error is:

"That the Court erred in ruling that the fact of the actual repair of the vessel for less than fifty (50) per centum of her agreed value, was not evidence relevant to the issue of the amount of damage done to the Alice."

If the rules of this Court as to assignment of error had been observed it would have demonstrated that this specification is unsupported. The Court did not rule as is here claimed. The fact of actual repair in 1881 was admitted in evidence. In the affirmation of the request of the plaintiff below, found in the fourth bill of exception, the Court charged the jury in determining the question to "take into consideration the place where the Alice lay and the uncertainty as to when, (if at all) a rise would come to float her off, and *all the circumstances in the case.*"

The fact of her subsequent repair was one of the circumstances left to the jury. The plaintiff in error presented no request to have the Court specially charge as to this evidence, except that contained in the thirteenth bill of exceptions, and that, as already shown (see page), was only as to the *practability* of recovering and repairing the vessel, and not as to the bearing of it on the *quantum* of injury. The fact that the Alice was repaired in 1881 was left to the jury with all the other facts in the case bearing on the question of both the *quantum* of damages and practicability of her recovery. Nothing is in any way shown withdrawing such evidence from the jury.

If it was desired to emphasize this item of evidence as bearing on the amount of damage a request to that effect should have been presented.

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